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Supreme Court, U.S.

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No. 00-___

IN THE

Supreme Court of the United States

STATOIL ASA,

Petitioner,

v.

HEEREMAC V.O.F., *ET AL*.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a cartel's anticompetitive conduct in a unified worldwide market has a direct, substantial, and reasonably foreseeable effect on U.S. domestic commerce, do the federal antitrust laws apply to a claim that arises directly out of the anticompetitive conduct but does not arise directly out of the conduct's domestic effect?

PARTIES TO THE PROCEEDINGS

Petitioner Statoil ASA was previously known as Den norske stats oljeselskap a.s.

In addition to the parties named in the caption, the following individuals and entities were parties to the proceedings below and are named as respondents in this Court:

Heerema Marine Contractors; Heerema Offshore Services U.S., Inc.; Heerema Offshore Construction Group, Inc.; Jan Meek; Pieter Heerema; McDermott International, Inc.; McDermott Incorporated; J. Ray McDermott, Inc.; J. Ray McDermott, S.A.; J. Ray McDermott Gulf Contractors, Inc.; McDermott Engineers & Constructors (USA), Inc.; McDermott Engineering Houston, L.L.C.; McDermott-ETPM, Inc.; Saipem SpA; Saipem International B.V.; Saipem UK Limited; Saipem (Portugal) - Comercio Maritimo, Sociedade Unipessonal, S.A.

CORPORATE DISCLOSURE STATEMENT

Petitioner Statoil ASA is wholly owned by the Government of Norway. On June 18, 2001, a minority of the capital stock of petitioner will be offered on the New York Stock Exchange and the Oslo Stock Exchange. According to published reports, some of the shares have already been subscribed.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDINGS ii
CORPORATE DISCLOSURE STATEMENT ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
RELEVANT STATUTORY PROVISIONS 1
JURISDICTION 1
STATEMENT 1
I. Statutory Background 2
II. Factual Background and Allegations of Petitioner's Complaint 3
III. Proceedings Below 5
  A. Proceedings in the District Court 5
  B. The Fifth Circuit's Decision 6
  C. Judge Higginbotham's Dissent 8
  D. Denial of Rehearing en banc 9
REASONS FOR GRANTING THE WRIT 10
I. The Fifth Circuit's Construction of the FTAIA Is Erroneous and Has Substantial Adverse Consequences for Application of the Federal Antitrust Laws. 10
  A. The Decision Below Misinterprets the FTAIA 10
  B. The Court of Appeals' Misreading of the FTAIA Undermines Enforcement of the Federal Antitrust Laws Against International Cartels 16
II. The Fifth Circuit's Decision Leaves the International Application of the Federal Antitrust Laws in Disarray. 21
CONCLUSION 29

TABLE OF AUTHORITIES

Cases

American Banana Co. v. *United Fruit Co.*, 213 U.S. 347 (1909) ... 22, 23

Associated General Contractors v. *California State Council of Carpenters*, 459 U.S. 519 (1983) ... 9

Atlantic Richfield Co. v. *USA Petroleum Co.*, 495 U.S. 328 (1990) ... 9

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) ... 11

Caribbean Broadcasting Sys. v. *Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998) ... passim

Eastman Kodak Co. v. *Image Tech. Servs.*, 504 U.S. 451 (1992) ... 16

Eurim-Pharm GmbH v. *Pfizer Inc.*, 593 F. Supp. 1102 (S.D.N.Y. 1984) ... 28

Federal Trade Comm'n v. *Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990) ... 16

Filetech v. *France Telecomm*, 157 F.3d 922 (2d Cir. 1998) ... 28

Flandreau Santee Sioux Tribe v. *United States*, 197 F.3d 949 (8th Cir.1999), *cert. denied*, 530 U.S. 1231 (2000) ... 11

Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977) ... 9

In re Insurance Antitrust Litig., 938 F.2d 919 (9th Cir. 1991) ... 22

In re Top Grade Sausage, 227 F.3d 123 (3d Cir. 2000) ... 11

INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1986) ... 12

Laker Airways v. *Sabena*, 731 F.2d 909 (D.C. Cir. 1984) ... 26

Liamuiga Tours v. *Travel Impressions*, 617 F. Supp. 920 (E.D.N.Y. 1985) ... 24, 28

Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 574, *cert. denied*, 481 U.S. 1029 (1987) ... 23

McElderry v. *Cathay Pac. Airways*, 678 F. Supp. 1071 (S.D.N.Y. 1988) ... 24, 28

McGlinchy v. *Shell Chemical Co.*, 845 F.2d 802 (9th Cir. 1988) 28

Nachman Corp. v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980) 12

No. 93-2050, 1995 U.S. Dist. LEXIS 19225, 1996-1 Trade Cas. (CCH) ¶ 71,263 (D.D.C. Dec. 21, 1995) 24

Pfizer, Inc. v. *Government of India*, 434 U.S. 308 (1978) 17, 18, 21, 28

Phillips Petroleum Co. v. *HeereMac, v.o.f.*, No. H-98-1670 (S.D. Tex. Jan. 23, 1999) 6

United States v. *Andreas*, 216 F.3d 645 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 573 (U.S. Nov. 27, 2000) 19

United States v. *Jenkins*, 904 F.2d 549 (10th Cir. 1990), *cert. denied*, 498 U.S. 962 (1990) 11

United States v. *Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998) 28

Statutes

15 U.S.C. § 1 1

15 U.S.C. § 2 1

15 U.S.C. § 45(a)(3) 20

15 U.S.C. § 6a .... passim

28 U.S.C. § 1254(1) 1

Other Authorities

128 Cong. Rec. H4981 (Aug. 3, 1982) (statement of Rep. Rodino) 15

128 Cong. Rec. H4982 (Aug. 3, 1982) (statement of Rep. McClory) 16

Black's Law Dictionary 1477 (6th ed. 1990) 11

Foreign Trade Antitrust Improvements Act, Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 97th Cong. 39 (1981) 14, 30

H.R. 5235, 97th Cong. § 2 (1982) 13, 16

H.R. Rep. No. 97-686, *Foreign Trade Antitrust Improvements Act of 1982*, 97th Cong., 2d Sess. 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487 .... passim

Pub. L. No. 97-290, 96 Stat. 1233 (1982) 2

Stephen Labaton, *The World Gets Tough on Price Fixers*, N.Y. TIMES, June 3, 2001, § 3 22

U.S. Dep't of Justice & Federal Trade Comm'n, *Antitrust Enforcement Guidelines for the International Operations* § 3.12 (1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13, 107 .... 20, 30

U.S. Dept't of Justice, Antitrust Div., International Competition Pol'y Advisory Comm., *Final Report to the Attorney General and Assistant Attorney General for Antitrust* (Feb. 2000) 18, 22

U.S. Sentencing Guidelines Manual § 2R1.1 20

PETITION FOR A WRIT OF CERTIORARI

Statoil ASA ("Statoil") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The district court's opinion and judgment dismissing petitioner's complaint (Pet. App. 39a-52a) are unpublished. The court of appeals' divided opinion affirming the judgment (Pet. App. 1a-38a (per Jolly, J., joined by Garza, J.; Higginbotham, J., dissenting)) is published at 241 F.3d 420. The court of appeals' order denying rehearing and rehearing en banc, accompanied by the separate statement of Judge Higginbotham (Pet. App. 53a-55a), is unpublished.

RELEVANT STATUTORY PROVISIONS

The relevant provisions of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2, and the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a, are reproduced in the appendix (Pet. App. 72a-73a).

JURISDICTION

The court of appeals entered its opinion on February 5, 2001, and denied petitioner's timely petition for rehearing with a suggestion of rehearing en banc on March 12, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT

This petition presents a straightforward question of statutory construction that has manifest importance for the application of the federal antitrust laws. In a number of decisions culminating in *Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764, 795-96 (1993), this Court deemed it to be "well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." In this case, however, a divided panel of the Fifth Circuit held that the principle recognized as well settled by *Hartford Fire* had been severely circumscribed more than a decade earlier by the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA").

According to the majority below, the FTAIA forbids federal antitrust suits except to the extent that the plaintiff's own injury arises directly from effects on United States domestic commerce. See Pet. App. 15a. That holding deprives the statute of its plain meaning, conflicts with Congress' avowed intent in enacting the FTAIA, and encourages world-wide cartels to engage in anticompetitive conduct that will harm the U.S. economy and U.S. consumers. Moreover, because other courts of appeals impose no such restriction on antitrust recoveries, see, *e.g.*, *Caribbean Broadcasting Sys.* v. *Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998), federal antitrust law now stands in an unacceptable state of confusion. As Judge Higginbotham recognized in his opinion regarding the denial of rehearing en banc:

> Make no mistake. The questions posed by this case are of immense importance in what is now truly a world market. Our decision laid beside the decision of the D.C. Circuit leaves the law a muddled mess. An authoritative answer from the Supreme Court or the Congress is needed.

Pet. App. 55a. Certiorari accordingly should be granted.

I. Statutory Background

This case involves the proper construction of the Foreign Trade Antitrust Improvements Act of 1982, enacted as Title IV of the Export Trading Company Act of 1982. Pub. L. No. 97-290, 96 Stat. 1233 (1982). Congress' goals in adopting the FTAIA were twofold: first, to address the "apparent perception among American businessmen that American antitrust laws are a barrier to joint export activities"; and second, to resolve the federal courts' conflicting formulations of "the proper test for determining whether United States antitrust jurisdiction over international transactions exists." H.R. Rep. No. 97-686, *Foreign Trade Antitrust Improvements Act of 1982*, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2487 ("*FTAIA Committee Report*").

The FTAIA, 15 U.S.C. § 6a (set forth in full in the footnote below),[1] provides in relevant part that the federal antitrust laws apply to conduct involving foreign commerce only if (1) such conduct has a direct, substantial, and reasonably foreseeable effect on either U.S. domestic, import or export commerce and (2) such U.S. effect gives rise to "a claim" cognizable under the federal antitrust laws. Where the conduct only affects export commerce, without any effect on U.S. domestic or import commerce, the FTAIA provides that a claim may only be brought with respect to "injury to export business in the United States."

II. Factual Background and Allegations of Petitioner's Complaint

Petitioner Statoil, a corporation wholly owned by the Government of Norway, operates offshore drilling projects in the North Sea for its own benefit and that of other oil producers, including affiliates of United States corporations.[2] Much of the oil produced in these North Sea projects, including over 400,000 barrels per day produced by Statoil, is imported into the United States.

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[1] Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless -

(1) such conduct has a direct, substantial, and reasonably foreseeable effect -

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1) (B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

[2] The opinions below refer to petitioner Statoil ASA by its prior corporate name, Den norske stats oljeselskap a.s.

Oil producers such as Statoil construct their large offshore drilling platforms by contracting for the services of "heavy lift" barges capable of hoisting and transporting offshore oil platforms and decks weighing in excess of 4000 tons. There are fewer than ten such heavy lift barges in the world, and the respondents control virtually all of them. Because of the limited number of such barges and their mobility, there exists a unified, world-wide market for heavy lift services. Respondents' combined monopoly power in this global market is indisputable.

This civil action arises from a federal criminal investigation that has resulted in indictments and guilty pleas for violations of the federal antitrust laws. One of the respondents, HeereMac v.o.f.,[3] pleaded guilty to violating the Sherman Act by conspiring with other heavy lift providers and admitted that its actions had a direct and substantial adverse effect on United States commerce. HeereMac was sentenced to pay a $49 million fine, which was attributed to the conspiracy's effect both in this country and abroad. Two individual defendants, one employed by HeereMac and the other a former officer of respondent J. Ray McDermott, S.A., have pleaded guilty as well.

Statoil's complaint alleges that respondents entered into an unlawful agreement to divide up the world-wide market and fix prices for heavy lift services. Pursuant to this conspiracy, the parties agreed that the Heerema and McDermott respondents would have exclusive rights to all heavy lift projects in the Gulf of Mexico as a *quid pro quo* for the Saipem respondents receiving a higher allocation of heavy lift projects in the North Sea. The conspiracy also involved an explicit bid rigging system in which respondents agreed upon which firms would submit bids and the prices to be bid for specific heavy lift projects in the Gulf of Mexico, the North Sea, and elsewhere.

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[3] The corporate respondents consist of three groups of corporations, referred to herein as the Heerema, Saipem, and McDermott respondents, which are based respectively in the Netherlands, Italy, and the United States. HeereMac v.o.f. is a corporate joint venture between one of the Heerema respondents and one of the McDermott respondents.

Respondents reached and implemented many of the terms of their unlawful agreement in the United States.

Respondents' conspiracy had a direct, substantial, and reasonably foreseeable effect on United States commerce. Respondents' agreement that Saipem would keep its heavy lift barge out of the Gulf of Mexico and that the remaining competitors would rig their bids directly affected U.S. domestic commerce by reducing the available sources of heavy lift services and substantially increasing the prices paid for such services in the United States. The amount of U.S. commerce affected was substantial. In connection with its criminal guilty plea, HeereMac admitted that, during the period from 1993 to 1997, the affected volume of commerce attributable to HeereMac exceeded $165 million for its heavy lift services in the Gulf of Mexico and over $1 billion for these services abroad.

Statoil was also directly injured by this conspiracy. The parties allocated a greater percentage of heavy lift projects in the North Sea to Saipem and similarly rigged bids at supra-competitive prices. The result was that Statoil and other North Sea purchasers were damaged through overcharges for the respondents' services in the same manner as purchasers in the Gulf of Mexico.

III. Proceedings Below

A. Proceedings in the District Court

Seeking redress under the federal antitrust laws for respondents' unlawful acts, petitioner and more than 40 other U.S. and foreign oil company plaintiffs filed multiple lawsuits in the United States District Court for the Southern District of Texas.[4] The district court held that that U.S. courts lack subject matter jurisdiction and plaintiffs lack standing unless "the primary injury" to the plaintiff is "caused in the United States and substantially affect[s] United States commerce." Pet. App. 50a (quoting from the same court's prior decision in the companion case of *Phillips Petroleum Co.* v. *HeereMac, v.o.f.*,

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[4] The other suits against respondents remain pending in district court before a different district judge.

No. H-98-1670, slip op. at 180 (S.D. Tex. Jan. 23, 1999)). Although the court expressly found that the defendants' conspiracy did have a direct, substantial, and reasonably foreseeable effect on U.S. domestic commerce, it rejected Statoil's claims because Statoil's injuries occurred abroad and these injuries did not have such an effect on United States commerce.

B. The Fifth Circuit's Decision

A divided panel of the Fifth Circuit affirmed, utilizing a different rationale.

From the outset, the panel majority recognized the considerable uncertainty attending its decision. "It is not helpful that the federal courts have generally disagreed as to the extraterritorial reach of the antitrust laws and have employed assorted tests to determine the scope of the Sherman Act." Pet. App. 8a. "The history of this body of case law," the majority explained, "is confusing and unsettled." *Id.* Although the court of appeals was obliged to "take on this task," the majority avowedly made "no claim that it is an easy one," although it believed that the question was "simplified" by the FTAIA. *Id.* at 9a.

Initially, the court of appeals "accept[ed] the contention that Statoil has sufficiently alleged that the defendants' conduct * * * had a direct, substantial, and reasonably foreseeable effect on the United States market." Pet. App. 13a. Specifically the court acknowledged Statoil's allegation that as a result of the market allocation conspiracy, "purchasers of heavy-lift services in the Gulf of Mexico were forced to pay inflated prices for those services." *Id.* at 5a-6a.

The court of appeals rejected the district court's holding that federal law requires that the plaintiff's "injury itself must be suffered in the United States." *Id.* at 14a n.22. That reading, although adopted by "many federal courts," has no basis in the text and thus "reflects a misreading of the FTAIA." *Id*; see also *id.* at 16a n.25 ("[I]f individuals conspire to restrain trade such that an American market is harmed, the United States antitrust laws can provide redress to any person injured by the domestic effects of the conspiracy, even if the injured party is located overseas.").

The panel majority nonetheless construed the FTAIA to mandate dismissal of petitioner's complaint. The majority expressly "recognize[d] that there may be a connection and an interrelatedness between the high prices paid for services in the Gulf of Mexico and the high prices paid in the North Sea." *Id.* at 14a-15a. But it found dispositive the requirement contained in Section 2 of the FTAIA that the effect of the conduct on United States commerce must "give[] rise to a claim" under the antitrust laws, construing this section to mean that a domestic effect must give rise to *the plaintiff's* claim. 15 U.S.C. § 6a(2). Thus, the majority opined that "the FTAIA requires more than a 'close relationship' between the domestic injury and the plaintiff's claim; it demands that the domestic effect 'gives rise' to the claim." Pet. App. 15a. In this respect, the majority read the statute to "preclude[] subject matter jurisdiction over claims by foreign plaintiffs against defendants where the situs of the injury is overseas and that injury arises from effects in a non-domestic market." *Id.* at 16a. "Thus, even though [Statoil] alleges that the antitrust conspiracy raised prices in the United States, it fails to assert jurisdiction under the antitrust laws because [its] injury did not arise from that domestic anticompetitive effect." *Id.* at 3a.[5]

The majority believed that its construction of the FTAIA was strengthened by Congress' limited power under the Commerce Clause, flatly asserting that Congress lacks the constitutional authority "to regulate purely foreign commerce in the Sherman Act." Pet. App. 12a & n.18. The majority further asserted that its decision was supported both by a "presumption against extraterritoriality" and by its interpretation of the statute's legislative history. Pet. App. 16a.

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[5] The panel majority further concluded that because the FTAIA deprived the federal courts of subject matter jurisdiction over petitioner's claim, petitioner necessarily lacked antitrust standing. Pet. App. 3a, 22a n.32. Reversal of the court's holding under the FTAIA would therefore a fortiori reverse its antitrust standing holding as well.

C. Judge Higginbotham's Dissent

Judge Higginbotham dissented, explaining that the majority's interpretation of the phrase "gives rise to a claim" is contrary to the express language of the FTAIA:

> The majority reads section 6a(2) to require that the effect "give rise to" *the plaintiff's* claim. It does not say that. It does say that the effect must "give[] rise to *a* claim." In other words, the effect on United States commerce must be sufficient to support a claim, an injury of some person in a way cognizable under the Sherman Act.

Pet. App. 24a (footnotes omitted) (emphasis in original). Section 2 of the FTAIA thus provides that the requisite effect on United States commerce must be an anticompetitive effect. As Judge Higginbotham stated, "The 'effect' described by section 6a(1) can be beneficial, neutral, or injurious. Section 6a(2) requires that this effect be injurious and, further, that the injury be caused by reduced, not increased, competition." *Id.* at 24a n.4. This does not mean, however, that the plaintiff's claim must arise from that effect.

Congress' intent in this regard, Judge Higginbotham explained, is consistently reflected in the legislative history. See Pet. App. 31a-32a. Among other things, Congress specifically manifested an intent to permit suits by "'purchasers [who] suffer economic injury abroad.'" *Id.* at 31a (quoting *FTAIA Committee Report* at 8, 1982 U.S.C.C.A.N. at 2495).

Judge Higginbotham also rejected the majority's suggestion that its reading of the FTAIA was compelled by the Commerce Clause or the presumption against extraterritoriality. There could not be any serious argument, he explained, that Congress is powerless to regulate "foreign conduct that affects United States Commerce." Pet. App. 33a. Furthermore, this Court's precedents reject the view that the Sherman Act applies only domestically, and any "presumption" regarding extraterritorial application is in any event irrelevant in the context of a statute such as the FTAIA that expressly addresses that question. *Id.* at 34a.

Finally, Judge Higginbotham explained that the majority's holding could not be reconciled with decisions of other circuits, none of which had so narrowly construed the FTAIA. See Pet. App. 33a. In particular, the D.C. Circuit has held that the FTAIA permits a suit by a foreign plaintiff against a foreign defendant competitor, so long as the defendant's conduct had the effect of harming others in United States commerce. *Id.* at 33a (discussing *Caribbean Broadcasting Sys.* v. *Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998)).[6] Accordingly Judge Higginbotham concluded that "the district court had jurisdiction over the suit and that Statoil had standing to sue the defendants under the Clayton Act." Pet. App. 38a.[7]

D. Denial of Rehearing en banc

The Fifth Circuit denied Petitioner's request for rehearing en banc. Pet. App. 54a-55a. Judge Higginbotham filed a separate statement, explaining that he had not called for the full court to be polled because it was virtually impossible to secure the necessary votes for *en banc* review after two judges had recused themselves from the case. Judge Higginbotham asserted that, because the conflict between the majority's ruling and the

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[6] The panel majority responded that the absence of authority in any other circuit limiting claims under the Sherman Act to injuries arising from effects on United States commerce was attributable to the failure of other courts to apply Section 2 of the FTAIA. Pet. App. 9a & n.13. The majority asserted that its position was supported by three unpublished district court decisions interpreting Section 2. See *id.* at 19a.

[7] Judge Higginbotham found it indisputable that Statoil had standing to assert this claim, finding that there was causation in fact and antitrust injury and that Statoil was a proper party to bring these claims. See Pet. App. 35a-36a. He pointed out that Statoil is a direct purchaser of services from the respondents, and it paid supra-competitive prices due to respondents' conspiracy. Thus, Statoil had clearly suffered "antitrust injury." See *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 334 (1990); *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Moreover, Statoil is a proper party to assert such claims because its injury is not speculative, there are none more directly harmed, and there is no risk of duplicate recovery. See *Associated Gen. Contractors* v. *California State Council of Carpenters*, 459 U.S. 519 (1983); see also *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977).

D.C. Circuit's decision left the law "a muddled mess" and because the question was one of "immense importance," either this Court or Congress should act to provide an "authoritative answer." *Id.* at 55a.[8]

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because the Fifth Circuit's interpretation of the FTAIA is erroneous and undermines the deterrent effect of the U.S. antitrust laws. Moreover, the Fifth Circuit's rationale is inconsistent with that of relevant Supreme Court and appellate court precedents, and leaves the law in disarray.

I. The Fifth Circuit's Construction of the FTAIA Is Erroneous and Has Substantial Adverse Consequences for Application of the Federal Antitrust Laws.

A. The Decision Below Misinterprets the FTAIA

The decision below seriously misconstrues the FTAIA, as is apparent from the statute's plain text and confirmed by its legislative history. Under the FTAIA, if conduct has a direct, substantial and reasonably foreseeable effect on U.S. commerce (FTAIA section 1, 15 U.S.C. § 6a(1)) and if this effect is anticompetitive (FTAIA section 2, 15 U.S.C. § 6a(2)), then the conduct is subject to the reach of the antitrust laws. Contrary to the Fifth Circuit's holding, there is nothing in the FTAIA that requires that the plaintiff's own injury arise from an effect on U.S. commerce.

Section 2 of the FTAIA provides that the effect that the defendants' conduct has on U.S. commerce must be of a kind that would "give[] rise to *a claim*" under the Sherman Act. (emphasis added.) The Fifth Circuit construed this section improperly to provide that an effect on U.S. commerce "give rise to *the plaintiff's claim*." As Judge Higginbotham correctly explained,

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[8] While the case was pending in the Fifth Circuit, Statoil filed a protective suit in a Norwegian court based on Norwegian competition law to assure that the applicable statute of limitations did not run.

> The word "a" has a simple and universally understood meaning. It is the indefinite article. There are many terms of art about which one can debate whether Congress uses the term as courts do, but this word is not one of them. If the drafters of the FTAIA had wished to say 'the claim' instead of 'a claim,' they certainly would have.

Pet. App. 24a-25a.[9]

Properly understood, Section 2 requires only that the defendant's conduct cause an effect in this country that is cognizable under the Sherman Act. In this respect, the FTAIA extends the concept of "antitrust injury," which provides that a plaintiff may recover only for "injur[ies] of the type the antitrust laws were intended to prevent" – *i.e.*, those that "reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977). By limiting jurisdiction under the Sherman Act to conduct with a domestic effect that "gives rise to a claim" under the Sherman Act, Section 2 provides that the domestic effect must be injurious rather than beneficial and anticompetitive rather than pro-competitive. Pet. App. 24a n.4 (Higginbotham, J., dissenting). In other words, Section 2 requires "that the United

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[9] The distinction between definite and indefinite articles is a canon of construction long familiar to Congress and the federal courts. "In construing statute, definite article 'the' particularizes the subject which it precedes and is word of limitation as opposed to indefinite or generalizing force 'a' or 'an'." Black's Law Dictionary 1477 (6th ed. 1990). Although courts do not regard the distinction as determinative in every circumstance, it is at least highly informative. *E.g.*, *In re Top Grade Sausage*, 227 F.3d 123, 128-29 (3d Cir. 2000) (finding significant that 11 U.S.C. § 330(a)(1)(A) applies to "*the* trustee, examiner, professional person, or attorney"); *Flandreau Santee Sioux Tribe* v. *United States*, 197 F.3d 949, 952 (8th Cir.1999) (finding significant that 26 U.S.C. § 6675(a) applies to "*the* person making [a] claim"), *cert. denied*, 530 U.S. 1231 (2000); *United States* v. *Jenkins*, 904 F.2d 549, 553 (10th Cir. 1990) (finding significant that 21 U.S.C. § 848 applies to "*a* position of organizer" or "*a* supervisory position"), *cert. denied*, 498 U.S. 962 (1990).

States suffer antitrust injury," which clearly occurred in this case. *Id.* at 26a n.7.

The legislative history confirms that this literal interpretation is exactly what Congress intended. The FTAIA Committee Report (at 11, 1982 U.S.C.C.A.N. at 2496) states that the "effect" on U.S. commerce "must be of the type that the antitrust laws prohibit," such that "a plaintiff would not be able to establish United States antitrust jurisdiction merely by proving a *beneficial* effect within the United States, such as increased profitability of some other company or increased domestic employment, when the plaintiff's damage claim is based on an extraterritorial effect on him of a different kind." (emphasis in original.) Here, it is uncontested that Statoil has alleged an anticompetitive effect on U.S. domestic commerce – artificially inflated prices for heavy lift services in the Gulf of Mexico – causing oil companies to suffer exactly the same "kind" of injury in domestic commerce that Statoil has suffered abroad.

The plain meaning of the phrase "a claim" is substantially reinforced in this case because the bill that ultimately became the FTAIA was revised to address this very issue. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1986) (quoting *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting)). As originally drafted by the Judiciary Committee, the bill stated that the effect on U.S. commerce must be "the basis of the violation alleged under this Act." H.R. 5235, 97th Cong. § 2 (1982). As explained by the committee's chairman, the intent of both the original and the final language was "to make it absolutely clear that the basis of American antitrust jurisdiction has to be a domestic *anticompetitive* effect." *FTAIA Committee Report* at 18, 1982 U.S.C.C.A.N. at 2500 (emphasis in original). The original language was deleted and replaced by the "gives rise to a claim" provision because the original language might have suggested "that an effect, rather than conduct, is the basis for a violation." *Id.*[10] The Fifth Circuit's opinion makes this very error, reading the statute as if it had never been changed, and misinterpreting it as the chairman feared to require a causal link between the domestic effect and Statoil's injury, rather than between the respondents' conduct and an anticompetitive effect in this country.[11]

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[10] Indeed, the House Committee that framed the FTAIA declined to adopt a specific proposal that would have produced the result imposed by the Fifth Circuit. A proposed revision of the FTAIA provided that the Sherman Act would "not apply to conduct involving trade or commerce with any foreign nation unless, *and only to the extent that*, such conduct has a direct, substantial and foreseeable effect of excluding a domestic person from trade or commerce with such foreign nation." *Foreign Trade Antitrust Improvements Act, Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong. 39 (1981) (emphasis in original) (second emphasis omitted) ("*FTAIA Hearings*"). The avowed purpose of the proposal was "that if a foreign entity or sovereign were to sue in U.S. courts the only damages or injury that may be considered for purposes of U.S. antitrust jurisdiction are those having domestic impact." *Id.* at 40 (testimony of David N. Goldsweig).

[11] The majority below rested its contrary interpretation of the legislative history on a single sentence in the House Committee Report that tracks this prior statutory language: "'the jurisdictional nexus must also be the basis for the injury alleged.'" Pet. App. 10a n.15 (quoting *FTAIA Committee Report* at 11, 1982 U.S.C.C.A.N. at 2497). However, the full quotation makes it clear that even with the original language, Congress intended simply to limit jurisdiction to cases in which the defendant's conduct had an anticompetitive effect on U.S. commerce:

> The Committee did not believe that the bill reported by the Subcommittee was intended to confer jurisdiction on injured foreign persons when that injury arose from conduct with *no* anticompetitive effects in the domestic marketplace. Consistent with this conclusion, the full Committee added language to the Sherman and FTC Act amendments to require that the "effect" providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws. This does *not*, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States. As previously set forth, it is sufficient that the conduct providing the basis of the claim has had the requisite impact on the domestic or import commerce of the United States.

FTAIA Committee Report at 11-12, 1982 U.S.C.C.A.N. at 2496-97 (emphases added). See also 128 Cong. Rec. H4981 (Aug. 3, 1982) (statement of Rep.

More broadly, the Fifth Circuit's construction of Section 2 is contrary to both the literal language and the purpose of the FTAIA as a whole. The FTAIA provides that the Sherman Act "shall not apply to conduct * * * unless" such conduct has the requisite effect on U.S. commerce and that effect is anticompetitive. Particular conduct is thus either subject to the antitrust laws or it is not. The Fifth Circuit's ruling is incompatible with this basic statutory structure, as it holds conspiratorial conduct subject to the antitrust laws with respect to some claims and not subject to the antitrust laws with respect to other claims arising out of the same conspiratorial conduct. In this case, the same unlawful conspiracy of respondents will simultaneously be subject to the antitrust laws as to claims relating to heavy lift services in the Gulf of Mexico and not subject to the antitrust laws as to claims by the same or different plaintiffs relating to services in the North Sea.

The only circumstance in which the FTAIA determines jurisdiction not by reference to the defendants' conduct but by reference to the nature of the plaintiff's claim and injury is in relation to export trade. The proviso at the end of the FTAIA applies to conduct that affects *only* U.S. export commerce with *no* effect on domestic or import commerce:

> If [the Sherman Act] appl[ies] to such conduct only because of the operation of paragraph (1) (B) [*i.e.*, based solely on effects on export commerce], then [the Sherman Act] shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. § 6a (proviso) . Thus, in the narrow circumstances in which the defendants' conduct affects export trade but does not harm domestic consumers, jurisdiction under the Sherman Act

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Rodino introducing FTAIA on the House floor) ("The bill we are acting on today also does not undermine the protections in our antitrust laws for consumers and competitors. It retains full protection for *any person* injured by conduct that has a direct, substantial, and reasonably foreseeable anticompetitive effect on the domestic or import commerce of the United States." (emphasis added)).

does turn on the nature of the plaintiff's claim and injury.[12] But the converse is also certainly true: if the conduct in question does harm U.S. domestic commerce and not "only" export commerce, then there is no such limitation on the injury for which plaintiffs may recover.[13]

Congress' intent in structuring the FTAIA in this fashion was to give assurances to exporters, by exempting from the antitrust laws certain conduct that did not threaten the domestic marketplace. As the House Report states:

> The intent of the Sherman and FTC Act amendments in H.R. 5235 is to exempt from the antitrust laws *conduct* that does not have the requisite domestic effects. This test, however, does not exclude all persons injured abroad from recovering under the antitrust laws of the United States.

FTAIA Committee Report at 10, 1982 U.S.C.C.A.N. at 2495 (emphasis in original).

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[12] As Judge Higginbotham recognized in his dissent, the majority below rendered this proviso surplusage by holding that the FTAIA forbids *any* suit that does not arise from an effect on U.S. domestic commerce. Pet. App. 25a n.5.

[13] The FTAIA's sponsors made this precise point in introducing the bill:

> It should also be noted that effects on the domestic commerce are treated differently from effects on our export commerce. In both cases, our commerce is fully protected. But if the requisite effect is on domestic commerce, there is *no limitation* in H.R. 5235 on who may recover. Under current law, foreign nationals located abroad may in certain circumstances recover under our antitrust laws. H.R. 5235 does not change that. But if the requisite effect is felt only with respect to our export commerce, then H.R. 5235 does limit who may recover to persons engaged in export trade or commerce "in the United States." In such an instance foreign nationals would be eligible to recover only to the extent they engaged in U.S. export trade in the United States. This distinction reflects our high sensitivity to anticompetitive domestic effects and our appropriately diminished sensitivity to export transactions which are, of course international transactions. In the latter instance our interest is limited to exporters in the United States and no one else. H.R. 5235 reflects this distinction.

128 Cong. Rec. H4982 (Aug. 3, 1982) (statement of Rep. McClory).

The overall concept here is apparent. The FTAIA was enacted to give exporters assurance that if their conduct related solely to overseas commerce with no domestic effect, they could undertake these activities without fear of antitrust prosecution by foreign consumers in U.S. courts. On the other hand, as demonstrated in the following section, the legislative history makes it clear that Congress intended that those engaging in unlawful conduct that does have the requisite effect on U.S. domestic commerce would be subject to and deterred by the full panoply of antitrust remedies, including suits by those injured by overseas effects.

B. The Court of Appeals' Misreading of the FTAIA Undermines Enforcement of the Federal Antitrust Laws Against International Cartels.

The Fifth Circuit's erroneous construction of the FTAIA merits review in this Court because it undermines the deterrent effect of the federal antitrust laws, particularly with respect to international cartels that have the potential to injure the U.S. economy.[14]

i. ***Private Enforcement.*** The court of appeals' holding that the Sherman Act is not available to redress anticompetitive injuries arising overseas will encourage international cartels of the very sort at issue in this case. The widely recognized principle that private antitrust damages deter anticompetitive conduct does not lose force at our shores. "The Supreme Court has repeatedly recognized that the accent of the Sherman and Clayton Acts is deterrence, requiring violators to pay full, treble damages, even if some plaintiffs gain a windfall or are foreigners." Pet. App. 29a (Higginbotham, J., dissenting).

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[14] As will be discussed in the next section, the decision below stands in considerable tension with decisions of other courts of appeals, particularly the D.C. Circuit. It nonetheless bears noting that this Court, in apparent recognition of the central role that the antitrust laws play in the U.S. economy, has regularly granted certiorari in important antitrust cases without regard to whether they presented a circuit conflict. No conflict was presented, for example, by the two cases most analogous to this one: *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764 (1993), and *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308 (1978). See also *Eastman Kodak Co.* v. *Image Tech. Servs.*, 504 U.S. 451, 456 (1992) (certiorari granted "[b]ecause of the importance of the issue"); *Federal Trade Comm'n* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 421 (1990) (certiorari granted in light of "concern about the implications" of lower court's ruling).

A special committee formed to advise the Department of Justice's Antitrust Division on international enforcement issues recently recognized that "international cartels appear to be a serious problem for the United States and the global economy" and emphasized that "[t]he U.S. private treble damage remedy plays a useful deterrent effect against anticompetitive conduct both at home *and abroad*." U.S. Dep't of Justice, Antitrust Div., International Competition Pol'y Advisory Comm., *Final Report to the Attorney General and Assistant Attorney General for Antitrust* 247 (Feb. 2000) ("*DOJ Int'l Antitrust Report*") (emphasis added).

This Court reached the same conclusion in *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308 (1978), holding that a foreign plaintiff (there, a foreign government) could bring suit under the Sherman Act based on a global price-fixing conspiracy involving sales by U.S. and foreign drug manufacturers of drugs in the U.S. and foreign markets. The Court held that application of the Sherman Act in that context was vital to the statute's deterrent effect:

> The conspiracy alleged by the respondents in this case operated domestically as well as internationally. If foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home. If, on the other hand, potential antitrust violators must take into account the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators.

434 U.S. at 315 (footnotes omitted).

The Fifth Circuit erred in dismissing the relevance of *Pfizer* on the grounds that it predated enactment of the FTAIA. Congress expressly embraced the view this Court articulated in *Pfizer* in enacting the FTAIA. The House Report on the statute states:

> A course of conduct in the United States -- *e.g.*, price fixing not limited to the export market -- would affect all purchasers of the target products or services, whether the purchaser is foreign or domestic. The conduct has the requisite effects within the United States, even if some purchasers take title abroad or suffer economic injury abroad. *Cf., e.g., Pfizer Inc., et al* v. *Government of India, et al*, 434 U.S. 308 (1978). * * *
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> * * * As the Supreme Court pointed out in *Pfizer, supra*, 434 U.S. at 314-315, to deny foreigners a recovery could under some circumstances so limit the deterrent effect of United States antitrust law that defendants would continue to violate our laws, willingly risking the smaller amount of damages payable only to injured domestic persons.

FTAIA Committee Report at 10, 1982 U.S.C.C.A.N. at 2495. The Report goes on to state Congress' intention that the FTAIA not "be misinterpreted as a legislative approval for American firms to engage in the type of international cartel activity prevalent before World War II." *Id.* at 13, 1982 U.S.C.C.A.N at 2498. The Fifth Circuit's holding thus runs directly contrary to Congress' intent in the FTAIA to protect the U.S. economy through private suits that would vindicate anticompetitive acts both here and abroad.

ii. ***Governmental Enforcement.*** The Fifth Circuit's holding applies as well to the antitrust enforcement authority of the federal government.

Because the FTAIA defines the subject matter jurisdiction of the federal antitrust laws, it governs actions brought by the Department of Justice under the Sherman Act and by the Federal Trade Commission under the FTC Act. See 15 U.S.C. §§ 6a, 45(a)(3). The International Antitrust Guidelines applicable to determinations by the Department of Justice and FTC whether to pursue antitrust enforcement actions thus reflect that "the jurisdictional limits of the Sherman Act and the FTC Act are delineated in the FTAIA." U.S. Dep't of Justice & Federal Trade Comm'n, *Antitrust Enforcement Guidelines for the International Operations* § 3.12 (1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,107 ("*International Guidelines*").

Of particular importance, the decision below may substantially limit the sanctions available to the government for international antitrust violations. Under the applicable Sentencing Guideline, the prison term and fine attributable to a defendant's conduct are determined largely by reference to "the volume of commerce done by him or his principal in goods or services *that were affected by the violation.*" U.S. Sentencing Guidelines Manual § 2R1.1(b)(2) (emphasis added). The Fifth Circuit's narrow reading of the FTAIA, excluding overseas commerce from the scope of the federal antitrust laws, accordingly appears to narrow substantially the conduct encompassed by the Sentencing Guidelines. Cf. *United States* v. *Andreas*, 216 F.3d 645, 676 (7th Cir.) ("The plain language of this section makes clear that the volume of commerce includes only those sales 'affected by the violation,' rather than all sales."), *cert. denied*, 121 S. Ct. 573 (2000).

The federal criminal investigation into this very conspiracy illustrates the potential impact of the lower courts' narrow reading of the FTAIA on federal antitrust enforcement. Respondent HeereMac pleaded guilty to an indictment for "rigging bids for the sale of heavy-lift derrick barge and related marine construction * * * services in the United States, the North Sea and the Far East." Pet. App. 57a, ¶ 2. HeereMac agreed that its conduct affected $165.8 million in U.S. commerce and more than $1 billion in overseas commerce, potentially giving rise to a vastly greater fine than would be available based on domestic commerce alone. *Id.* 61a-62a, ¶ 7(ii), (iv). However, the defendants took "the position that the United States would not be able to show that the [non-U.S.] conduct related to such commerce violated United States antitrust laws or affected commerce under the Guidelines." *Id.* 62a ¶ 7(iv). In light of uncertainty on this issue, the parties agreed to a reduced $20 million addition to the fine (characterized as "an aggravating factor") to encompass the harm caused overseas by defendants' conduct.

The decision below would therefore seemingly insulate HeereMac and other criminal defendants from fines directly attributable to the overseas effects of its international cartel and may well prevent the government from seeking "enhancement" of the fine on this basis as well. Reduction in fines would surely dilute the efficacy of federal antitrust actions. As the Sentencing Commission has commented, "the most effective method to deter individuals from committing this crime is through imposing short prison sentences coupled with *large fines.*" U.S. Sentencing Guidelines Manual § 2R1.1 (commentary) (emphasis added).

The implications of the Fifth Circuit's decision on federal antitrust enforcement are accordingly significant. At any given time, several dozen federal grand juries – "about one-third of the [Antitrust] Division's criminal investigations" – are directed at international cartels, constituting what federal officials regard as "just the tip of the iceberg." *DOJ Int'l Antitrust Report* at 168. The Department of Justice thus has "has given top priority to aggressive enforcement against international cartels," and since 1995 "has built a record of successful prosecutions of nearly 20 international cartels, charging more than 80 corporate and 60 individual defendants in the process." *Id.* at 167.[15] The government has made "[v]igorous enforcement against international cartels * * * a top priority because international cartels typically pose a greater threat to U.S. businesses and consumers than do domestic cartels since they tend to be highly sophisticated and extremely broad in their geographic reach and economic impact." *Id.* at 166 n.14. See also Stephen Labaton, *The World Gets Tough on Price Fixers*, N.Y. TIMES, June 3, 2001, § 3, at 1 (explaining that the "push to uncover and prosecute price-fixing and global cartels that was begun early in the Clinton administration * * * is expected to remain a high priority in the Bush administration").

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[15] See also *DOJ Int'l Antitrust Report* at 163 (prosecutions have encompassed "a number of large, complex, and geographically diverse international cartels in a broad spectrum of commerce, including food and feed additives, chemicals, vitamins, graphite electrodes (used in manufacturing steel), and marine construction and transportation services").

In sum, by limiting substantially the private and public sanctions applicable to international antitrust violations, the Fifth Circuit's decision will compromise an important deterrent to international cartels. Where, as here, the U.S. market is a necessary component of the conspiracy, cartel participants will be tempted by the very calculus that this Court feared in *Pfizer*. They may well decide to engage in unlawful conduct in the world-wide market with the assurance that profits earned overseas will dwarf fines and private remedies limited only to effects inside the United States.[16]

II. The Fifth Circuit's Decision Leaves the International Application of the Federal Antitrust Laws in Disarray.

The decision below creates marked uncertainty regarding the extraterritorial application of the federal antitrust laws. For decades – under both the Sherman Act and subsequently under the FTAIA – this Court and the courts of appeals have applied a single principle in determining whether jurisdiction exists under the Sherman Act. In all manner of contexts, and despite some disagreement on the precise relationship to U.S. commerce required, the courts have looked to whether the defendant's "conduct" had a sufficient "effect" on U.S. commerce. Every indication is that Congress intended to carry that approach forward in the FTAIA.

The Fifth Circuit's divided opinion in this case points in precisely the opposite direction. Not only did the majority below acknowledge considerable uncertainty regarding the extraterritorial application of the antitrust laws, see *supra* at 6, but it contributed to that uncertainty by announcing a substantially more cabined view of jurisdiction under the Sherman Act than any found in the teachings of this Court or the holdings of its sister circuits. According to the Fifth Circuit, even if a defendant's "conduct" has a sufficient "effect" on U.S. domestic commerce, a particular plaintiff's claim will be barred unless that claim arises directly from that domestic effect.

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[16] The sanctions foreclosed by the Fifth Circuit's ruling constitute an essential deterrent even with respect to conduct that could potentially be addressed under the competition statutes of other nations. "It is important that the United States have a credible ability to prosecute these violations of the antitrust laws; without that ability, nations with haphazard enforcement records that are sheltering such conduct have little incentive to act." *DOJ Int'l Antitrust Report* at 252. Moreover, the inherent costliness of plaintiffs having to maintain multiple suits in multiple jurisdictions against multiple defendants would discourage the filing of claims and the vindication of rights in any jurisdiction.

1. Although Congress enacted the FTAIA nearly two decades ago, this Court has considered only a single case in which the statute was at issue. In *Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764 (1993), the plaintiffs alleged, *inter alia*, that overseas "reinsurers" had conspired to restrain competition in the U.S. and Canadian insurance markets. The Ninth Circuit held that the plaintiffs' claims were not barred by the FTAIA because the "effects" of the defendants' activities "on the commerce of the United States met the statutory standard of being 'direct, substantial and reasonably foreseeable.'" *In re Insurance Antitrust Litig.*, 938 F.2d 919, 932 (9th Cir. 1991) (quoting 15 U.S.C. § 6a(1)). This Court, in turn, agreed "that the District Court undoubtedly had jurisdiction of these Sherman Act claims" (509 U.S. at 795), explaining that all that was required was that the conduct intentionally produce "some substantial effect" on U.S. commerce:

> Although the proposition was perhaps not always free from doubt, see *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909), it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect on the United States. Such is the conduct alleged here: that the London reinsurers engaged in unlawful conspiracies to affect the market for insurance in the United States and that their conduct in fact produced substantial effect.

Id. at 795-96 (footnotes and citations omitted).

In an accompanying footnote, the Court rejected the suggestion that the FTAIA required a contrary result. The Court stated that "the conduct alleged" by the plaintiffs (*i.e.*, an overseas conspiracy that purposefully affected U.S. commerce) "plainly meets [the FTAIA's] requirements." 509 U.S. at 796 n.23. The *Hartford Fire* decision does not even hint at the significant additional limitation imposed by the Fifth Circuit in this case that the plaintiff's claim must arise from a domestic effect.

To be sure, the principal focus of the *Hartford Fire* decision was on the issue of comity; and, given the nature of the plaintiffs' allegations, there was no need for the Court to resolve the precise issue raised in this case. *Id.* Nevertheless the Fifth Circuit's decision rests on reasoning that is incompatible with *Hartford Fire* in several important respects. First, while the majority below rested its decision on Congress' supposed far-reaching intent to limit liability under the Sherman Act to injuries arising in United States commerce (Pet. App. 17a-18a), *Hartford Fire* correctly recognized that Congress adopted the FTAIA simply to exempt export activities that do not harm U.S. commerce. 509 U.S. at 796 n.23. Second, the majority below construed the Sherman Act narrowly in light of the presumption against extraterritoriality. But as the just-quoted excerpt from Justice Souter's opinion in *Hartford Fire* explains, this Court long ago abandoned the *American Banana* rationale that was based on such a presumption and has held that the Sherman Act encompasses extraterritorial conduct with domestic effects.[17] Finally, *Hartford Fire* is irreconcilable with the Fifth Circuit's holding (Pet. App. 12a & n.18) that Congress lacks the constitutional power to legislate with respect to foreign conduct that (as in this case) has a substantial and purposeful effect on United States commerce. Even the *Hartford Fire* dissenters agreed that "this Court has repeatedly upheld [Congress'] power to make laws applicable to persons or activities beyond our territorial boundaries where United States interests are affected." 509 U.S. at 813-14.

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[17] See, *e.g.*, *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986) ("The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce."); see also *Hartford Fire*, 509 U.S. at 814 (Scalia, J., dissenting) (agreeing that the Court has "found the presumption to be overcome with respect to our antitrust laws; it is now well established that the Sherman Act applies extraterritorially").

2. Like this Court in *Hartford Fire*, the courts of appeals other than the Fifth Circuit have not read the FTAIA to alter fundamentally the extraterritorial application of the Sherman Act. Those courts hold simply that the statute requires an inquiry into whether the defendant's conduct has a direct, substantial, reasonably foreseeable and anticompetitive effect on U.S. commerce, without regard to whether the plaintiff's own injury arises from domestic effects.

a. In *Caribbean Broadcasting System* v. *Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998) ("*Caribbean*"), the plaintiff radio station alleged that a competing station and a telecommunications company had conspired to monopolize the market for radio advertising in the Eastern Caribbean. All of the parties operated outside the territorial boundaries of the United States. The district court correctly read the FTAIA to preclude jurisdiction under the Sherman Act except when (i) the plaintiff alleges a "'direct, substantial and reasonably foreseeable effect'" on U.S. commerce, and (ii) that effect is "anti-competitive," a requirement drawn from the discussion in the *FTAIA Committee Report* of the statute's "gives rise to a claim" clause. No. 93-2050, 1995 U.S. Dist. LEXIS 19225, at *6, 1996-1 Trade Cas. (CCH) ¶ 71,263 (D.D.C. Dec. 21, 1995).[18] Applying that standard, the district court dismissed the complaint, concluding that the plaintiff had failed to assert "a claim of adverse effect on U.S. commerce arising out of Defendants' alleged misconduct." *Id.* at *7. The district court reasoned that the plaintiff's "only connection to U.S. commerce [was] that some of [its] broadcasts from Tortola are heard by listeners in the U.S. and that some U.S. advertisers purchase time on [its] stations." *Id.* at *9 n.10. The district court deemed "[s]uch a *de minimis* connection to U.S. commerce" to be "not sufficient to justify jurisdiction." *Id.*

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[18] See 1995 U.S. Dist. LEXIS 19225, at *6 (citing *McElderry* v. *Cathay Pac. Airways, Ltd.*, 678 F. Supp. 1071, 1077 (S.D.N.Y. 1988) (citing, in turn, *Liamauiga Tours* v. *Travel Impressions, Ltd.*, 617 F. Supp. 920, 924 (E.D.N.Y. 1985))).

The D.C. Circuit agreed with the district court's articulation of the FTAIA's dual requirements, but held that the minimal allegations regarding an effect on U.S. commerce were sufficient to confer jurisdiction under the Sherman Act. The court of appeals held that the plaintiff had sufficiently "allege[d] that the challenged conduct had a '"direct, substantial, and reasonably foreseeable effect" on domestic or import commerce, or the export opportunities of a domestic person." 148 F.3d at 1085 (quoting *FTAIA Committee Report* at 3, 1982 U.S.C.C.A.N. at 2488). Because a number of the stations' advertising customers were located in the United States, the court found it "quite plausible that the plaintiffs' alleged conduct would have a significant effect upon U.S. commerce." 148 F.3d at 1086. The D.C. Circuit held that the plaintiff had sufficiently alleged "harm to customers" in the market for "English-language radio broadcast advertising in the Eastern Caribbean." *Id.* at 1086-87. The court found it sufficient that "the complaint alleges specifically that U.S. customers in the relevant market suffered antitrust injury, to wit, they paid excessive prices for advertising." *Id.*

The suggestion of the majority below that *Caribbean* could be distinguished on the ground that "the plaintiff's claim in that case arose from the anticompetitive effects on the [U.S.] domestic market" (Pet. App. 21a n.31) mischaracterizes both the legal and the factual bases for the D.C. Circuit's decision. As to the legal basis, the D.C. Circuit's holding and its reasoning did not rest on whether the plaintiff's claimed injury arose from those domestic effects. As to the facts, the plaintiff's claims in *Caribbean* principally involved injuries arising in the Caribbean *outside* the territorial jurisdiction of the United States. The D.C. Circuit found it sufficient that *some* U.S. advertising consumers had been injured by the defendant's conduct, and permitted the plaintiff to pursue *all* of its claims for damages, most of which arose from effects on advertisers outside U.S. territorial jurisdiction. Under the Fifth Circuit's holding, by contrast, the plaintiff in *Caribbean* would have been permitted to recover only with respect to business done with the limited number of U.S. advertisers adversely affected by the defendants' anticompetitive conduct and only to the extent that the plaintiff's claim could be found actually to arise out of such effect. See Pet. App. 15a.[19]

The majority below strained even further when it suggested that *Caribbean* was distinguishable on the ground that the D.C. Circuit did not explicitly reject the Fifth Circuit's construction of the FTAIA's "gives rise to a claim" clause. Pet. App. 20a-21a n.31. Although the D.C. Circuit did not quote that specific phrase, it read the FTAIA to require only that the plaintiff allege an anticompetitive effect in United States commerce. Nor is there any serious argument that the D.C. Circuit majority was simply unaware of Congress' intent with respect to that clause, such that in a later case it might abandon the holding of *Caribbean* and reach a contrary result. To the contrary, the D.C. Circuit expressly cited and quoted the *FTAIA Committee Report*, which discusses the issue at length. 148 F.3d at 1085. Ultimately, the fact that the D.C. Circuit held that the FTAIA requires only an anticompetitive effect on U.S. commerce without pausing expressly to reject the Fifth Circuit's contrary reading simply reflects the fact that the decision below is neither supported nor even suggested by the statutory text and legislative history.[20]

In a prior decision, the D.C. Circuit also rejected the proposition, accepted by the Fifth Circuit in this case, that the FTAIA altered the extraterritorial application of the Sherman Act. In *Laker Airways* v. *Sabena*, 731 F.2d 909 (D.C. Cir. 1984), the defendants allegedly conspired to undermine competition in air routes between the United States and the United Kingdom. The D.C. Circuit reiterated the settled rule that the Sherman Act applies to extraterritorial conduct giving rise to domestic effects: "Jurisdiction exists under United States antitrust laws whenever conduct is intended to, and results in, substantial effects within the United States." *Id.* at 925. The D.C. Circuit squarely rejected the proposition that the FTAIA limited the effects on U.S. commerce that would give rise to jurisdiction under the Sherman Act:

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[19] It appears that American advertisers in *Caribbean* were harmed primarily by the exclusion of the plaintiff from the market. Thus, the foreign effect caused the U.S. domestic injury, not vice versa.

[20] If anything, there is a stronger basis for finding jurisdiction in this case than in *Caribbean* in that respondents' scheme included anticompetitive conduct within the territorial jurisdiction of the United States.

> In passing this Act, which clarifies the applicability of United States antitrust laws to export trade, Congress *did not change . . . the application of antitrust laws to conduct producing the requisite effect in United States territory.*

Id. at 946 n.137 (emphasis added) (citing *FTAIA Committee Report* at 13, 1982 U.S.C.C.A.N. at 2498). See also 731 F.2d at 956 (Starr, J., dissenting) ("The majority's opinion demonstrates persuasively that the jurisdictional basis for Laker's action in the United States District Court is firmly established under settled principles of United States and international law.").

b. The contrasting approaches of the Fifth and D.C. Circuits typify the substantial uncertainty that now surrounds the proper construction of the FTAIA and therefore the international application of the federal antitrust laws. Neither the federal government in the enforcement context nor other courts that have construed the FTAIA have adopted a requirement that the injury giving rise to jurisdiction must arise directly from an effect on U.S. commerce. For example, the federal government's International Antitrust Enforcement Guidelines provide that in cases involving "an 'effect' on either import transactions or commerce within the United States," the Department of Justice and FTC simply "apply the 'direct, substantial, and reasonably foreseeable' standard of the FTAIA." *International Guidelines* § 3.121.[21]

Decisions of other circuits addressing the extraterritorial application of the Sherman Act similarly point in a direction quite different than the reading of the FTAIA adopted by the majority below. While those cases did not reach the precise question addressed by the court below, it is nonetheless noteworthy that the other circuits have adopted a considerably more expansive view of federal antitrust jurisdiction than that announced by the Fifth Circuit. In *McGlinchy* v. *Shell Chemical Co.*, 845 F.2d 802 (9th Cir. 1988), for example, the Ninth Circuit cited and adopted the view of several district court decisions construing Section 2 of the FTAIA in the same way Judge Higginbotham did in his dissent below:[22] to require only that the plaintiff "allege *antitrust injury* to the market or to competition in general." 845 F.2d at 814-15 (emphasis added). In *United States* v. *Nippon Paper Industries Co.*, 109 F.3d 1, 4 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998), the First Circuit, citing *Hartford Fire*, took the view that "the case law now conclusively establishes that civil antitrust actions predicated on wholly foreign conduct which has an intended and substantial effect in the United States comes within Section One's jurisdictional reach."[23] See also *Filetech* v. *France Telecomm*, 157 F.3d 922, 931 (2d Cir. 1998) (similar, endorsing reasoning of *Nippon Paper*).

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[21] Testimony before Congress regarding the FTAIA reflected a concern that foreign trade would be impeded if the civil standard for applying the antitrust laws did not conform to the standard applicable to governmental enforcement proceedings under the International Guidelines. *FTAIA Hearings, supra*, at 35, 54 (testimony of David N. Goldsweig).

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[22] For example, the court in *Eurim-Pharm GmbH* v. *Pfizer Inc.*, 593 F. Supp. 1102, 1106 (S.D.N.Y. 1984), held that the FTAIA limits jurisdiction to cases in which "the conduct providing the basis for the claim has a direct, substantial reasonably foreseeable anticompetitive effect on United States domestic, import or export commerce." Similarly, *Liamuiga Tours* v. *Travel Impressions*, 617 F. Supp. 920, 924 (E.D.N.Y. 1985), held that "the effect required for jurisdictional nexus must be an anticompetitive effect in the domestic market." And *McElderry* v. *Cathay Pacific Airways*, 678 F. Supp. 1071, 1077 (S.D.N.Y. 1988), agreed with *Eurim-Pharm* and *Liamuiga Tours* that "[a]n anticompetitive effect on United States commerce is required for jurisdiction nexus." Although the majority below noted that other district courts have adopted its reasoning (see *supra* at 5 n.5), the conflicting authority in the district courts simply highlights the uncertainty surrounding the proper resolution of the question presented.

[23] See also *id.* at 4 n.3 (reading *Hartford Fire* as having "held [a] defendant's foreign conduct to be within the Sherman Act's proscriptive ambit because it was part of a scheme which 'was intended to and did in fact produce a substantial effect on the American insurance market'" (quoting 509 U.S. at 795 n.21)).

* * * * *

As Judge Higginbotham correctly recognized in his opinion respecting the denial of rehearing en banc, the Fifth Circuit's new approach to international antitrust jurisdiction leaves the law a "muddled mess." Pet. App. 55a. That situation is untenable given the profound importance of international trade to the domestic economy and the need to provide appropriate guidance to businesses dealing in such trade. Congress sought to provide such guidance in enacting the FTAIA: "[A]t a time when international trade plays an immense and increasingly important role in the economy, it is appropriate for Congress to formulate a standard to be applied uniformly throughout the federal judicial system." *FTAIA Committee Report* at 6, 1982 U.S.C.C.A.N. at 2491. Despite the plain language of the FTAIA, there is currently no such uniformity or predictability in judicial interpretation. This Court's intervention is accordingly warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 11, 2001

United States Court of Appeals,
Fifth Circuit

DEN NORSKE STATS OLJESELSKAPAS,
Plaintiff-Appellant,

v.

HEEREMAC VOF; Heerma Marine Contractors; Heerema Offshore Services U.S., Inc.; Heerema Offshore Construction Group, Inc.; Jan Meek; Pieter Heerema; McDermott International, Inc.; McDermott, Inc.; J. Ray McDermott, SA; J. Ray McDermott, Inc.; J. Ray McDermott Gulf Contractors, Inc.; McDermott Engineers & Constructors (USA), Inc.; McDermott Engineering Houston LLC; McDermott - ETPM, Inc.; Saipem SPA; Saipem International BV; Saipem UK Limited; Saipem (Portugal) -- Comercio Maritimo, Sociedade Unipessoal, SA,
Defendants-Appellees.

No. 99-20763

Feb. 5, 2001

Norwegian oil corporation brought antitrust conspiracy claim against providers of heavy-lift barge services. The United States District Court for the Southern District of Texas, Melinda Harmon, J., dismissed for lack of subject matter jurisdiction, and appeal was taken. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that antitrust laws did not apply to plaintiff's claims that anticompetitive conspiracy inflated its North Sea operating costs.

Affirmed.

Patrick E. Higginbotham, Circuit Judge dissented and filed opinion.

Arthur R. Miller (argued), Cambridge, MA, Jacob Dweck, Rebecca L. Hirsch, Sutherland, Asbill & Brennan, Washington, DC, James R. McGibbon, Sutherland, Asbill & Brennan, Atlanta, GA, Craig Barkell Glidden, Patricia Hall Webb, Jeffrey Alan Kaplan, McFall, Glidden, Sherwood & Breitbeil, Houston, TX, for Plaintiff-Appellant.

Jonathan D. Schiller, William A. Isaacson, Boies, Schiller & Flexner, Washington, DC, for Heeremac Vof, Heerma Marine Contractors, Heerema Offshore Services U.S., Inc., Heerema Offshore Constr. Group, Inc., Meek and Heerema.

William J. Linklater, Michael A. Pollard, Baker & McKenzie, Chicago, IL, Jacks C. Nickens, Clements, O'Neill, Pierce, Nickens & Wilson, Houston, TX, for Heerma Marine Contractors, Heerema Offshore Services U.S. Inc., Heerema Offshore Construction Group Inc., Jan Meek and Pieter Heerema.

Charles Alan Gilman (argued), Patricia Farren, Cahill, Gordon & Reindel, New York City, Innes A. Mackillop, White, Mackillop & Boham, Houston, TX, for McDermott Intern., Inc., McDermott, Inc., J. Ray McDermott SA, J. Ray McDermott Inc., J. Ray McDermott Gulf Contractors Inc., McDermott Engineers & Constructors (USA) Inc., McDermott Engineering Houston LLC and McDermott-ETPM Inc.

Robin C. Gibbs, Kathy Dawn Patrick (argued), John Albert Basinger, Gibbs and Bruns, Houston, TX, for Saipem SPA, Saipem Intern. BV, Saipem UK Ltd. and Saipem (Portugal)-Comercio Maritimo, Sociedade Unipessoal, SA.

Appeal from the United States District Court for the Southern District of Texas.

Before JOLLY, HIGGINBOTHAM and EMILIO M. GARZA, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This appeal requires us to interpret the scope of the United States antitrust laws and their application to foreign conduct. The plaintiff is a Norwegian oil corporation that conducts business solely in the North Sea. It seeks redress under the United States antitrust laws against the defendants for an alleged anticompetitive conspiracy that supposedly inflated the plaintiff's operating costs in the North Sea. Supreme Court precedent makes clear as a general proposition that United States antitrust laws "do not regulate the competitive conditions of other nations' economies," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). More specifically, today we are bound by the plain language of the Foreign Trade Antitrust Improvements Act (FTAIA). Thus, even though the plaintiff alleges that the antitrust conspiracy raised prices in the United States, it fails to assert jurisdiction under the antitrust laws because the plaintiff's injury did not arise from that domestic anticompetitive effect. Accordingly, we find that the district court properly dismissed the plaintiff's antitrust claims for lack of subject matter jurisdiction. It follows that we affirm the court's determination that the plaintiff lacked antitrust standing to bring these claims in United States federal court.

I

We begin with the basics. Sections 1 and 2 of the Sherman Act prohibit restraints of trade and monopolization. Section 1 reads:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

15 U.S.C. § 1. Section 2 of the Sherman Act states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or

commerce among the several States, or with foreign nations, shall be deemed guilty of a felony....

15 U.S.C. § 2. The FTAIA, enacted by Congress in 1982 to clarify the application of United States antitrust laws to foreign conduct, limits the application of such laws when non-import foreign commerce is involved. The FTAIA states that the antitrust laws will not apply to non-import commerce with foreign nations unless the conduct at issue has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce *and* "such effect gives rise to a claim under" the antitrust laws.[1]

II

The plaintiff, Den Norske Stats Oljeselskap As ("Statoil"), is a Norwegian oil company that owns and operates oil and gas drilling platforms exclusively in the North Sea. The defendants are providers of heavy-lift barge services in the Gulf of Mexico, the North Sea, and the Far East. Only six or seven heavy-lift barges exist in the world. These immense vessels have cranes capable of hoisting and transporting offshore oil platforms and decks weighing in excess of 4,000 tons. During the 1993-1997 time frame, which is at issue in this suit, the three defendants controlled these barges.[2] Between 1993 and 1997, Statoil purchased heavy lift barge services from the HeereMac and Saipem defendants in the North Sea.

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[1] 15 U.S.C. § 6a. In full, the FTAIA reads:

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--

(1) such conduct has a direct, substantial, and reasonably foreseeable effect--

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section. [Proviso] If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

Statoil alleges that the defendants conspired to fix bids and allocate customers, territories, and projects between 1993 and 1997. Under the alleged arrangement, the defendants agreed that HeereMac and McDermott would have exclusive access to heavy-lift projects in the Gulf of Mexico, while Saipem would receive a higher allocation of North Sea projects in exchange for staying out of the Gulf. The defendants also allegedly agreed to submit embellished bids on heavy-lift projects. As a result of this conspiracy, Statoil contends that it paid inflated prices for heavy-lift barge services in the North Sea.[3] Statoil further argues that the conspiracy compelled it to charge higher prices for the crude oil it exported to the United States.[4] Finally, Statoil asserts that purchasers of heavy-lift services in the Gulf of Mexico were forced to pay inflated prices for those services because of the conspiracy.[5]

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[2] The first group of defendants, HeereMac v.o.f. and its subsidiaries, a foreign corporation with its principal place of business in The Netherlands, controlled four or five of the barges. Saipem S.P.A., a British company, controlled one heavy-lift barge. McDermott, Inc., an American corporation, apparently controlled the last barge.

[3] Statoil does not allege that it purchased any heavy-lift services in the United States or that the contracts it entered into included agreements to apply United States law.

[4] Statoil asserts that it has exported an average of 400,000 barrels of oil a day into the United States over the past three years. Statoil does not, however, allege any injury to itself derived from its export of oil to the United States.

III

By way of background, it should be noted that in December 1997, the United States Department of Justice filed a criminal complaint against defendants HeereMac and Jan Meek, one of HeereMac's managing directors. The complaint alleged that the defendants conspired "to suppress and eliminate competition by rigging bids for the sale of heavy-lift derrick barge and related marine construction services in the United States and elsewhere."[6] HeereMac and Meek submitted to United States jurisdiction and pled guilty to the charges. They agreed to pay fines of $49 million and $100,000, respectively.

Following the guilty pleas, numerous companies across the globe filed suit in United States federal court seeking redress for injuries stemming from defendants' conduct. The first of these suits was filed in the Southern District of Texas in June 1998 by Phillips Petroleum Company and three of its foreign-based subsidiaries.[7]

On January 22, 1999, the court dismissed Phillips's claims for injuries sustained by its foreign subsidiaries relating to projects in foreign waters but allowed those claims asserting injury from projects in United States waters to proceed. While the court acknowledged the worldwide nature of the alleged conspiracy in its order, it nonetheless held that subject matter jurisdiction did not exist for those claims pled by foreign-based subsidiaries for injuries allegedly sustained on foreign platforms.[8] Specifically, the court determined that those claims did not fall within the ambit of the United States antitrust laws because the claims did not arise from a direct and substantial effect on United States commerce.[9]

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[5] Statoil does not allege that it owns, operates, or commissions any oil exploration platforms within United States waters, or that it conducted business with any of the defendants incorporated in the United States.

[6] The plea agreement separately addressed issues related to commerce affected by defendants' conduct in the Gulf of Mexico and commerce affected by defendants' activity in the North Sea and Far East.

[7] A group of about forty plaintiffs brought a second suit against defendants in the Northern District of Texas.

Statoil filed this suit in the same court in December 1998. The court dismissed Statoil's complaint against the defendants on July 12, 1999.[10] In its order, the court relied heavily upon its decision in the Phillips case and found no subject matter jurisdiction over the claims because "Statoil's damages arise from its projects in the Norwegian sector of the North Sea"; thus, the FTAIA's requirement that the effect on domestic commerce "gives rise" to the antitrust claim was not satisfied. *See* 15 U.S.C. § 6a(2). The court also held that the defendants' conspiracy "did not have a direct, substantial, and reasonably foreseeable anticompetitive effect on United States trade or commerce" under the FTAIA. *See* 15 U.S.C. § 6a(1). Finally, the court determined that "Statoil lacks standing to bring a claim under United States antitrust laws because its alleged injuries are not of the type that the antitrust statute was intended to redress."[11] Statoil timely appealed the judgment.

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[8] The court determined it did have subject matter jurisdiction over the alleged conspiracy and injury "relating to the Mahogany project in the territorial waters of the United States in the Gulf of Mexico."

[9] The court stated that "the claims of the foreign-based [subsidiaries] regarding injuries sustained in relation to the foreign platforms" were not justiciable in United States courts because "the primary injury to that party must be caused in the United States and substantially affect United States commerce."

[10] The defendants filed motions to dismiss based on lack of subject matter jurisdiction (Rule 12(b)(1)) and failure to state a claim under the Sherman Act (Rule 12(b)(6)).

[11] The court then declined to exercise supplemental jurisdiction over the remaining common law claims pursuant to 28 U.S.C. § 1367(c)(3).

IV

The issue presented to us is primarily one of statutory interpretation. Specifically, this appeal requires us to interpret the relevant provisions of the FTAIA to determine whether the defendants' conduct and Statoil's injury in the North Sea presents a justiciable claim in the federal courts of the United States.

It is not helpful that the federal courts have generally disagreed as to the extraterritorial reach of the antitrust laws and have employed assorted tests to determine the scope of the Sherman Act. The history of this body of case law is confusing and unsettled.[12] However, as far as this appeal is concerned, our work is simplified by Congress' passage in 1982 of the FTAIA, which specifically exempts certain foreign conduct from the antitrust laws. This circuit has never interpreted the relevant portions of the FTAIA as they apply to global conspiracies and resulting foreign injury.[13] Today, we take on this task, and make no claim that it is an easy one.

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[12] The first case to consider the extraterritorial application of United States antitrust law was *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909). In that case, Justice Holmes announced that the Sherman Act could have no application to conduct that occurred outside of the United States. *Id.* at 357, 29 S.Ct. 511. However, as the United States became increasingly involved in foreign commerce in the years following *American Banana*, the Supreme Court relaxed its previous stance and held that the Sherman Act authorized jurisdiction over foreign defendants so long as domestic commerce was affected and some conduct occurred within the United States *See United States v. Sisal Sales Corp.*, 274 U.S. 268, 276, 47 S.Ct. 592, 71 L.Ed. 1042 (1927). In 1945, the Second Circuit laid the groundwork for what became known as the "effects test" to determine antitrust jurisdiction over foreign conduct. In *United States v. Aluminum Company of America ("Alcoa")*, 148 F.2d 416 (2d Cir.1945), Judge Learned Hand determined that a United States court would have jurisdiction over the conduct of foreign corporations where that conduct was intended to, and actually did, affect United States commerce. *Id.* at 443-44. The *Alcoa* effects test has been gradually adopted by most federal courts, albeit in various forms. The already confused effects test was even more imprecise following the Ninth Circuit's decision in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 613 (9th Cir.1976). In that case, the court introduced a balancing test that considered principles of comity in addition to domestic effects when determining the scope of antitrust jurisdiction over foreign defendants. The Fifth Circuit adopted a similar comity-informed approach. *See American Rice, Inc. v. Arkansas Rice Growers Co-op. Ass'n*, 701 F.2d 408, 413 (5th Cir.1983). Most recently, in 1993, the Supreme Court confirmed that "the Sherman Act applies to foreign conduct that was

V

A

We review *de novo* a district court's ruling on a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.[14] *See Hebert v. United States,* 53 F.3d 720, 722 (5th Cir.1995). In ruling on a motion to dismiss for lack of subject matter jurisdiction, a court may evaluate (1) the complaint alone, (2) the complaint supplemented by undisputed facts evidenced in the record, or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *See Barrera-Montenegro v. United States,* 74 F.3d 657, 659 (5th Cir.1996). Nevertheless, we must accept all factual allegations in the plaintiff's complaint as true. *See Williamson v. Tucker,* 645 F.2d 404, 412 (5th Cir.1981).

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meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 796, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993).

[13] In fact, no circuit appears to have interpreted the critical portion of the FTAIA at issue in this case--the requirement that the domestic effect on commerce "gives rise" to the antitrust claim. 15 U.S.C. § 6a(2).

[14] It is true that the defendants filed 12(b)(6) motions along with their 12(b)(1) motions. However, the district court's order establishes that the court dismissed the claims for lack of subject matter jurisdiction rather than failure to state a claim under the antitrust laws: [T]he court orders that Defendants' motions to dismiss for lack of subject matter jurisdiction are granted and that this case is dismissed without prejudice. All remaining pending motions are moot.

We first outline Statoil's argument that United States antitrust jurisdiction encompasses the conduct and injury in its complaint.

B

Statoil argues that the FTAIA does not preclude the district court's jurisdiction over its antitrust claims. Specifically, Statoil argues that the FTAIA was enacted exclusively to ensure that the conduct providing the basis of the plaintiff's claim have the requisite domestic effects, and was not intended to preclude recovery to foreign plaintiffs based on the situs of the injury.[15] Moreover, Statoil contends that Section 2 of the FTAIA was inserted only to ensure that the effect on United States commerce that provides jurisdiction is itself a violation of the antitrust laws; that is, the statute simply requires that there be some anticompetitive, ***harmful*** effect in this country--not just a positive or neutral domestic effect.[16]

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[15] Statoil refers to the legislative history of the FTAIA to support its interpretation: The Committee did not believe that the bill reported by the subcommittee was intended to confer jurisdiction on injured foreign persons when that injury arose from conduct with no anticompetitive effects in the domestic marketplace. Consistent with this conclusion, the full committee added language to the Sherman and FTC Act amendments to require that the "effect" providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws. This does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States. H.R.Rep. No. 97-686, at 12.

[16] Statoil cites additional legislative history in support of this interpretation of the FTAIA:... [T]he domestic "effect" that may serve as the predicate for antitrust jurisdiction under the bill must be of the type that the antitrust laws prohibit. For example, a plaintiff would not be able to establish United States antitrust jurisdiction merely by proving a beneficial effect within the United States, such as increased profitability of some other company or increased domestic employment, when the plaintiff's damage claim is based on an extraterritorial effect on him of a different kind. H.R.Rep. No. 97-686, at 12 (1982) (citation omitted).

Addressing specifically the FTAIA's requirement that the domestic effect "gives rise" to its antitrust claim, Statoil primarily argues that, because the defendants operating in the Gulf of Mexico were able to maintain their monopolistic pricing only because of their overall market allocation scheme (which included agreements regarding operations in the North Sea), Statoil's injury in the North Sea was a "necessary prerequisite to" and was "the quid pro quo for" the injury suffered in the United States domestic market. Statoil alleges that the market for heavy-lift services in the world is a single, unified, global market; therefore, because the United States is a part of this worldwide market, the effect of the conspiracy, whether in the United States or in the North Sea, "gives rise" to any claim that is based upon this conspiracy.[17]

C

We must disagree with Statoil's arguments based on our reading of the antitrust statutes. Although we are controlled by the plain language of the statutes, we also find that the legislative history of the FTAIA and applicable case law supports our determination that the district court lacked jurisdiction over Statoil's claims.

We begin with an analysis of the relevant statutes and the plain language contained therein.

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[17] In addition to its statutory interpretation arguments, Statoil cites a number of cases in an attempt to support its proposition that subject matter jurisdiction exists under the Sherman Act so long as the conspiratorial conduct had an affect on United States commerce. *See Caribbean Broad. Sys., Ltd. v. Cable and Wireless PLC,* 148 F.3d 1080 (D.C.Cir.1998); *United States v. Nippon Paper Indus. Co.,* 109 F.3d 1 (1st Cir.1997); *Hartford Fire,* 509 U.S. 764, 113 S.Ct. 2891, 125 L.Ed.2d 612; *Pfizer, Inc. v. Gov't of India,* 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978). However, none of these cases interpret the relevant provision of the FTAIA (15 U.S.C. § 6a(2)) and, therefore, none of these cases inform our inquiry into the proper interpretation of the "gives rise to" requirement.

1

The Supreme Court has explained that "[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive." *Escondido Mut. Water Co. v. La Jolla Indians,* 466 U.S. 765, 772, 104 S.Ct. 2105, 80 L.Ed.2d 753 (1984). We are thus bound by the plain, ordinary meaning of the language used in the antitrust statutes and, in particular, the FTAIA.

We begin by first noting that the Sherman Act itself applies only to conduct in "trade or commerce *with* foreign nations." 15 U.S.C. §§ 1,2 (emphasis added). The commerce that gives rise to the action here--the contracting for heavy lift barge services in the North Sea--was not United States commerce *with* foreign nations, but commerce *between* or *among* foreign nations--that is, between or among Statoil (a Norwegian corporation), Saipem (England), and HeereMac (The Netherlands). Therefore, we doubt that foreign commercial transactions between foreign entities in foreign waters is conduct cognizable by federal courts under the Sherman Act.[18]

As we have noted, the FTAIA states that the antitrust laws will not apply to non-import foreign conduct unless (1) such conduct has a direct, substantial, and reasonably foreseeable effect on United States domestic commerce, and (2) such effect gives rise to the antitrust claim.[19] The conduct of these defendants is foreign conduct that falls within the general parameters of the FTAIA and, thus, Statoil must show that the two specific requirements of the statute are met to establish subject matter jurisdiction over its claims.[20]

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[18] This interpretation is further strengthened by the limits placed on Congressional power in the Constitution. Article I, § 8 of the Constitution gives Congress the authority only to regulate interstate commerce and "commerce *with* foreign nations" (emphasis added). Thus, even if Congress indeed intended to regulate purely foreign commerce in the Sherman Act, it was not empowered to do so under the Commerce Clause.

[19] The dissent, like Statoil, argues that Section 2 should be read to require only that the domestic effect give rise to *any* antitrust claim, not necessarily the plaintiff's claim. This interpretation contradicts the explicit intent of Congress to require that the effect must give rise to the particular injury claimed by the plaintiff in the suit: ... [T]he full committee added language to the Sherman and FTC Act amendments to

We accept the contention that Statoil has sufficiently alleged that the defendants' conduct--that is, the agreement among heavy-lift service providers to divide territory, rig bids, and fix prices--had a direct, substantial, and reasonably foreseeable effect on the United States market. Statoil alleges that the conspiracy not only forced purchasers of heavy-lift services in the Gulf of Mexico to pay inflated prices, but also that the agreement compelled Americans to pay supra-

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require that the "effect" providing the jurisdictional nexus *must also be the basis for the injury alleged under the antitrust laws.* H.R.Rep. No. 97-686, at 12 (emphasis added). The dissent asserts that reading Section 2 as requiring that the domestic effect give rise to the plaintiff's claim renders the FTAIA's proviso redundant. Although giving the statute a clear understanding is difficult, we disagree with the dissent's reading. We read Section 1(B) to provide that the export commerce covered under the exception must be conducted by a person who is engaged in that export business in the United States. Section 2 provides that the defendant's antitrust effect on this export commerce described in Section 1(B) must give rise to the plaintiff's cause of action. The proviso, in turn, states that the recovery for injuries resulting from the conduct described in Section 1(B), which gives rise to the plaintiff's antitrust claim in Section 2, is limited to injuries occurring in the United States. Therefore, we fail to see the redundancy to which the dissent refers. *See In re Copper Antitrust Litigation v. Sumitomo Corp.*, 117 F.Supp.2d 875, 884 (W.D.Wis.2000) (holding that "[t]he logical interpretation of the language of § 6a is that Congress extends domestic jurisdiction to extraterritorial conduct only when the plaintiffs have been injured by the effects on the domestic market.").

[20] Specifically, Statoil's claim falls under Section 6(a)(1)(A) and not Section 6(a)(1)(B), because defendants' conduct had no substantial effect on export trade with foreign nations.

competitive prices for oil.[21] These allegations are sufficient to satisfy the first requirement of the FTAIA.

However, Statoil fails to show that this effect on United States commerce in any way "gives rise" to its antitrust claim.[22] Based on the language of Section 2 of the FTAIA, the effect on United States commerce--in this case, the higher prices paid by United States companies for heavy-lift services in the Gulf of Mexico--must give rise to the claim that Statoil asserts against the defendants. That is, Statoil's injury must stem from the effect of higher prices for heavy-lift services in the Gulf. We find no evidence that this requirement is met here. The higher prices American companies allegedly paid for services provided by the McDermott defendants in the Gulf of Mexico does not give rise to Statoil's claim that it paid inflated prices for HeereMac and Saipem's services in the North Sea. This is not to say that any antitrust injury suffered by customers or competitors of McDermott that arose from the anticompetitive effect in the Gulf of Mexico cannot be addressed.[23] This means only that, while we recognize that there may be a connection and an interrelatedness between the high prices paid for services in the Gulf of Mexico and the high prices paid in the North Sea, the FTAIA requires more than a "close relationship" between the domestic injury and the plaintiff's claim; it demands that the domestic effect "gives rise" to the claim.[24]

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[21] Statoil's complaint alleges that the defendants' conspiracy adversely affected at least $165 million in United States commerce during the 1993-97 period.

[22] Statoil repeatedly frames the inquiry as whether a plaintiff can suffer injury abroad, or whether the injury itself must be suffered in the United States. This approach is an incorrect formulation of the threshold question and reflects a misreading of the FTAIA. We recognize that many federal courts, including the district court in these proceedings, might have chosen to frame the analysis in this manner. However, the proper inquiry to make here is, regardless of the situs of the plaintiff's injury, did that injury arise from the anticompetitive effects on United States commerce? *See, e.g., Caribbean,* 148 F.3d 1080 (identifying that, while the situs of the injury was overseas, the claim arose from the conspiracy's effects on the United States advertising market).

[23] The dissent notes with disapproval that our interpretation of the FTAIA means that "a foreign cartel that fixes prices worldwide will be subject to suit under the Clayton Act only from plaintiffs injured in American commerce." However, our reading produces the precise result intended by Congress--that "[f]oreign purchasers should enjoy the

Statoil asks that we interpret the requirement of Section 2 that the domestic "*effect* " give rise to a claim under the antitrust laws as merely requiring that the defendants' domestic "*conduct* " (here, for example, agreements relating to the Gulf of Mexico) give rise to a claim. This interpretation is not true to the plain language of the FTAIA. Moreover, under such an expansive interpretation, any entities, anywhere, that were injured by any conduct that also had sufficient effect on United States commerce could flock to United States federal court for redress, even if those plaintiffs had no commercial relationship with any United States market and their injuries were unrelated to the injuries

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protection of our antitrust laws *in the domestic marketplace*, just as our citizens do." H.R.Rep. No. 97-686, at 10-11.

[24] Statoil argues that, had the district court accepted its allegation of a worldwide conspiracy as true, the requirements of the FTAIA would be satisfied and subject matter jurisdiction would exist. We cannot agree. Regardless of the nature of the conspiracy, Statoil must allege an injury that falls within the scope of the antitrust statutes. The assumed existence of a single, unified, global conspiracy does not relieve Statoil of its burden of alleging that its injury arose from the conspiracy's proscribed effects on United States commerce. This principle was stressed by the Supreme Court in *Matsushita:* Respondents also argue that the check prices, the five company rule, and the price fixing in Japan are all part of one large conspiracy that includes monopolization of the American market through predatory pricing. The argument is mistaken. *However one decides to describe the contours of the asserted conspiracy--whether there is one conspiracy or several--respondents must show that the conspiracy caused them an injury for which the antitrust laws provide relief.* 475 U.S. at 584 n. 7, 106 S.Ct. 1348 (emphasis added).

suffered in the United States.[25] Such an expansive reading of the extraterritorial application of the antitrust laws was never intended nor contemplated by Congress. *See EEOC v. Arabian Am. Oil Co.,* 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) (noting that "[w]e assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is the affirmative intention of the Congress clearly expressed, we must presume it is primarily concerned with domestic conditions.") (citation omitted).

In sum, we find that the plain language of the FTAIA precludes subject matter jurisdiction over claims by foreign plaintiffs against defendants where the situs of the injury is overseas and that injury arises from effects in a non-domestic market.[26] Although the plain language of the relevant statutes is clear and controlling, we nonetheless turn now to address briefly the legislative history of the FTAIA to illustrate how that history reinforces our interpretation of the extraterritorial reach of the antitrust laws.

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[25] The dissent repeatedly emphasizes that the antitrust laws have always contemplated foreign plaintiffs recovering for their injuries. We do not disagree. We simply read the FTAIA to provide that, if individuals conspire to restrain trade such that an American market is harmed, the United States antitrust laws can provide redress to any person injured by the domestic effects of the conspiracy, even if the injured party is located overseas. *See Sumitomo*, 117 F.Supp.2d 875, 885 ("On the other hand, the antitrust laws do not apply to an action by a person injured overseas because of price-fixing in a foreign market even if the same defendants engage in price-fixing affecting an American market.").

[26] Statoil alleges that it paid inflated prices for heavy-lift services in the North Sea. This injury, however, does not arise from the alleged effect on United States commerce--that is, the higher prices paid by United States consumers for heavy-lift services in the Gulf of Mexico. While Statoil also asserts that the conspiracy had the effect of raising crude oil prices in the United States, Statoil alleges no injuries to itself occurring in the market for crude oil or arising from this domestic effect.

Before analyzing the legislative history of the FTAIA, we reemphasize that "[l]egislative history is relegated to a secondary source behind the language of the statute in determining congressional intent; even in its secondary role legislative history must be used cautiously." *Boureslan v. Aramco,* 857 F.2d 1014, 1018 (5th Cir.1988) (citation omitted). We are thus "not free to substitute legislative history for the language of the Act." *Id.*

The FTAIA House Report states that the purpose of the law is "to more clearly establish when antitrust liability attaches to international business activities" and to ascertain "the precise legal standard to be employed in determining whether American antitrust law is to be applied to a particular transaction." H.R.Rep. No. 97-686, at 5, 8.[27] Moreover, the relevant House Report shows that Congress intended to exclude purely foreign transactions, like the contract for services in the North Sea between Statoil and the foreign defendants, from the reach of United States antitrust laws:

> A transaction between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws.... It is thus clear that wholly foreign transactions as well as export transactions are covered by the [FTAIA], but that import transactions are not.

Id. at 10.

Thus, the legislative history of the FTAIA, while not controlling, reinforces our conclusion that a foreign plaintiff injured in a foreign marketplace must show that a substantial domestic effect on United States commerce "gives rise" to its antitrust claim.[28]

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[27] The dissent seems to imply that the sole purpose of the FTAIA is to "exempt exporting from antitrust scrutiny." Although this is clearly a primary goal of the legislation, the dissent ignores the second purpose behind the FTAIA--to resolve "possible ambiguity" in the extraterritorial reach of antitrust jurisdiction. *Id.* at 4-5.

We now turn to address briefly applicable case law and its effect on our interpretation of the FTAIA.

3

Because few courts have directly addressed the specific meaning of the FTAIA's Section 2 requirement that a domestic effect "gives rise" to the plaintiff's antitrust claim, very little case law exists to aid our inquiry. Our interpretation of the FTAIA's requirements, however, is entirely consistent with prior case law defining the jurisdictional reach of the antitrust laws. Furthermore, those decisions illustrate that our interpretation of Section 2 is not a novel reading of the statute.

To begin, we note that the only three federal courts that have addressed the narrow question before us interpreted Section 2 exactly as we have. *See Kruman v. Christie's Int'l PLC, et al.,* 129 F.Supp.2d 620 (S.D.N.Y.2001) (holding that the FTAIA permits jurisdiction "only where the conduct complained of had 'direct, substantial and reasonably foreseeable' effects in the United States and the effects giving rise to jurisdiction are the basis for the alleged injury."); *In re Microsoft Corp.*, 2001 U.S. Dist. LEXIS 305, at *37 (holding that, under the FTAIA, "foreign consumers who have not participated in any way in the U.S. market have no right to institute a Sherman Act claim."); *Sumitomo,* 117 F.Supp.2d 875, 876 (holding that "it is plain from the language of this act and bolstered by the legislative history that a private plaintiff cannot sue under the antitrust laws of the United States for injuries incurred as a result of international transactions that have an anticompetitive effect on a United States market if the domestic anticompetitive effect is not the same one that gives rise to the plaintiff's injury.").

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[28] The dissent argues that our decision in this case is contrary to the statement in the legislative history that "[a] course of conduct in the United States ... would affect all purchasers of the target domestic products or services, whether the purchaser is foreign or domestic." Again, we do not assert that foreign purchasers of domestic products can never sue in United States federal court. We only hold that the FTAIA requires that a foreign plaintiff show that its injuries arise from a United States market. This is not a novel reading of the FTAIA: [T]he legislative history [of the FTAIA] reflects that Congress was proceeding from the premise that, wherever title is taken or economic injury is suffered, at least some aspect of the sales transaction took place in the United States. Any doubt on that score is resolved by ... the sentence which states that "foreign purchasers should enjoy the protection of our antitrust laws *in the domestic marketplace,* just as our citizens do." *In re Microsoft Corp. Antitrust Litigation,* 2001 U.S. Dist. LEXIS 305, at *37 (M.D.Md. Jan. 12, 2001).

We further note that we have found no case in which jurisdiction was found in a case like this--where a foreign plaintiff is injured in a foreign market with no injuries arising from the anticompetitive effect on a United States market.[29] In those cases where the domestic effect on commerce did not give rise to the plaintiff's claim, courts have found subject matter jurisdiction lacking. *See, e.g., S. Megga Telecomm. Ltd. v. Lucent Technologies, Inc.*, 1997 WL 86413 (D.Del. Feb.14, 1997) (anticompetitive domestic effect of higher prices for United States consumers did not "give rise" to plaintiff's claim for lost sales to defendant); *The "In" Porters, S.A. v. Hanes Printables, Inc.,* 663 F.Supp. 494 (M.D.N.C.1987) (anticompetitive domestic effect (lost exports of United States exporters) did not "give rise" to plaintiff's claim for lost sales in France due to marketing sales agreement with defendant); *de Atucha v. Commodity Exch., Inc.,* 608 F.Supp. 510 (S.D.N.Y.1985) (conspiracy's effect on silver prices on United States exchange did not "give rise" to plaintiff's injury on London exchange).

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[29] *See Sumitomo,* 117 F.Supp.2d 875, 883 ("So far as can be determined, the issue [of interpreting the language of Section 2] never came up. In the reported cases, the courts had no occasion to address the same effects requirement because in each case, the plaintiffs' injuries arose out of the same effects experienced by the markets.").

On the other hand, in every case where jurisdiction has been found, the substantial effect on United States commerce has "give[n] rise" to the plaintiff's injury and claim under the antitrust laws. *See, e.g., Carpet Group Int'l v. Oriental Rug Importers Ass'n,* 227 F.3d 62 (3rd Cir.2000) (anticompetitive effect on domestic rug market "gives rise" to plaintiff's injury); *Caribbean,* 148 F.3d 1080 (monopolization of United States market for advertising in the Caribbean "gives rise" to plaintiff's claim of being blocked from that market); *Nippon Paper,* 109 F.3d 1 (collusion amongst fax paper producers resulted in higher prices for fax paper in the United States, which "gives rise" to the United States' claim); *Hartford Fire,* 509 U.S. 764, 113 S.Ct. 2891, 125 L.Ed.2d 612 (conspiracy's effect on the United States insurance market "gives rise" to the plaintiffs' injury, the inability to obtain certain types of coverage in that market).

Finally, we note that none of the cases cited by Statoil in support of its interpretation of the FTAIA cast doubt upon our plain language interpretation of Section 2. Statoil cites *Pfizer v. India,* 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978), for the proposition that antitrust jurisdiction exists over foreign conduct like the commerce between Statoil and defendants in this case. *Pfizer,* however, was decided four years before enactment of the FTAIA, and the court's holding was limited to the question of whether a foreign government qualified as a "person" under the Sherman Act. *Id.* at 320, 98 S.Ct. 584.[30] Statoil further maintains that *Caribbean Broadcasting,* 148 F.3d 1080, requires that jurisdiction be found over its claims. Initially, that case looks similar to today's case in that both the plaintiff and the defendant were foreign, and the defendant's international conspiracy had anticompetitive effects both inside and outside the United States. The critical difference, however, is that the effect on United States commerce in that case (that is, limiting to one radio station potential advertisers in the United States who wished to advertise in the Eastern Caribbean radio market) gave rise to the injury suffered by the plaintiff, a competing radio station--that is, exclusion of the plaintiff from the market for United States advertising dollars. *Id.* at 1082, 1086. As previously explained, that is simply not true with Statoil's claims.[31] Similarly, Statoil's reliance on *Nippon Paper,* 109 F.3d 1, is misplaced because the global conspiracy in that case had the domestic effect of raising fax paper prices in the United States, which gave rise to the government's claim under the antitrust laws. *Id.* at 2.

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[30] The dissent relies heavily upon *Pfizer* in asserting that Statoil's claim should be cognizable in United States federal court. The *Pfizer* court, however, did not analyze the requisite elements that must be present before a foreign entity can sue under the United States antitrust laws. Indeed, *Pfizer* 's narrow holding was "only that a foreign nation *otherwise entitled to sue in our courts* is entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff." *Id.* (emphasis added).

Simply put, Statoil has cited no case law to support an interpretation of Section 2 of the FTAIA different from the one we now adopt. This absence of such precedent, when considered with the plain language of the statute and evidence of congressional intent in enacting the FTAIA, reinforces our conclusion in this case.

VI

In sum, we find that the district court did not err when it dismissed Statoil's antitrust claims for lack of subject matter jurisdiction. Any reading of the FTAIA authorizing jurisdiction over Statoil's claims would open United States courts to global claims on a scale never intended by Congress. Without subject matter jurisdiction, United States federal courts are without power to entertain Statoil's claims.[32] The judgment of the district court is therefore

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[31] The dissent asserts that we "struggle" to reconcile *Caribbean Broadcasting* with our holding in the case before us. However, the court in *Caribbean Broadcasting,* for whatever reason, completely ignored Section 2 of the FTAIA in its analysis. Given that a decision in the case before us requires an interpretation of that provision, we find *Caribbean Broadcasting* unhelpful to any resolution of Statoil's claim. Indeed, we fail to understand how *Caribbean Broadcasting* provides any meaningful support for the dissent's interpretation of Section 2, given that the plaintiff's claim in that case arose from the anticompetitive effects on the domestic market for radio advertising in the Caribbean. *See* 148 F.3d at 1086.

AFFIRMED.

PATRICK E. HIGGINBOTHAM, Circuit Judge, dissenting:

I agree that this is not an easy case, but I have no hesitation in concluding that the Foreign Trade and Antitrust Improvements Act does not here divest the federal courts of jurisdiction and that the plaintiff has standing. With deference to my colleagues, I am persuaded by the plain text of section 6a, as well as its statutory context, legislative history, and purpose.

The claim is that defendants allocated the market for hundreds of millions of dollars of commerce--an allocation that placed United States markets at the mercy of monopoly charges in an industry vital to national security. The charged conspiracy was no foreign cabal whose secondary effects only lapped at United States shores. The impact of the conspiracy was direct and substantial. Indeed, the participation of American business in the market allocation scheme was critical to its success. The plaintiff here is a foreign company, true enough, but it was injured by the same acts of defendants that injured American plaintiffs whose right to seek recovery of their losses the district court recognized in this litigation.

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[32] As Statoil has no claim under the United States antitrust laws, we affirm the district court's finding that Statoil lacked standing to bring its claims. Based on *Associated Gen'l Contractors Inc. v. California State Council of Carpenters,* 459 U.S. 519, 535-45, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), the determination of Statoil's standing to bring its claims is dependent upon our finding of subject matter jurisdiction. Thus, in concluding that the FTAIA bars Statoil's claims against defendants under the Sherman Act, we have perforce found that Statoil's injury is not of the type that the antitrust statute was intended to forestall.

With the Foreign Trade and Antitrust Improvements Act, Congress set out to insulate United States business from its antitrust laws for certain business conducted outside the country. Its central purpose was to assist American business in competing abroad. This pass from antitrust restrictions did not extend to all conduct outside the United States. It stopped short of insulating conduct having direct and substantial effects upon American commerce and causing antitrust injury to that commerce sufficient to support a claim for treble damages.

I am not persuaded that when illegal conduct produces these domestic effects, that Congress intended to close the door to a foreign company injured by the same illegal conduct. That was not the law before this effort to assist American business abroad, and Congress did not intend to change it or do so unwittingly. I would reverse and remand for further proceedings.

I

A

Interpretation of a statute must begin with the text of the statute itself. Section 6a states in its entirety:

Sections 1 to 7 of this title [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--

(1) such conduct has a direct, substantial, and reasonably foreseeable effect--

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

[Proviso:] If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.[1]

Section 6a(1) requires an effect on (A) domestic or import commerce of the United States or (B) the export commerce of a person in the United States.[2] Section 6a(2) requires that this effect "give[ ] rise to a claim under the provisions of sections 1 to 7 of this title, the Sherman Act, other than this section." The majority reads section 6a(2) to require that the effect "give[ ] rise to" *the plaintiff's* claim. It does not say that. It does say that the effect must "give[ ] rise to *a* claim."[3] In other words, the effect on United States commerce must be sufficient to support a claim, an injury of some person in a way cognizable under the Sherman Act.[4]

The literal text of the statute supports this conclusion. It reads, "gives rise to a claim." The word "a" has a simple and universally understood meaning. It is the indefinite article. There are many terms of art about which one can debate whether Congress uses the term as courts do, but this word is not one of them. If the drafters of the FTAIA had wished to say "the claim" instead of "a claim," they certainly would have.[5]

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[1] 15 U.S.C.A. § 6a (1997).

[2] For brevity, I herein refer to the effects required by section 6a(1) as effects on "United States commerce."

[3] 15 U.S.C. § 6a(2) (emphasis added).

[4] The effect must cause "antitrust injury." The "effect" described by section 6a(1) can be beneficial, neutral, or injurious. Section 6a(2) requires that this effect be injurious and, further, that the injury be caused by reduced, not increased, competition.

The reference to "a" claim makes clear that the "effect" described by section 6a(1) must violate the Sherman Act--that is, harm competition. Section 6a(1) requires that the conspiracy have an effect on United States commerce; section 6a(2) requires that this effect either monopolize commerce or restrain trade in the United States, thereby giving rise to a Sherman Act claim. Section 6a(2) removes jurisdiction over conspiracies whose effects on United States commerce are beneficial or benign, even if they restrain competition in other parts of the world. That an injury that "gives rise to" an antitrust claim must be an injury caused by harm to competition is no light notion. It is a well established and fundamental tenet of antitrust law.[6] Termed "antitrust injury," it is frequently encountered in enforcement action under the Clayton Act, by which Congress enlisted private enforcement in supplementation of governmental enforcement of the Sherman Act.[7]

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[5] Courts will not presume that statutory language is redundant or surplusage. The majority's interpretation, however, makes the proviso at the end of section 6a redundant. Section 6a(1)(B) states that the Sherman Act applies to conduct with effects on "export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States." The proviso limits the applicability of the Sherman Act under section 6a(1)(B) "to such conduct only for injury to export business in the United States ." Thus, while (1)(B) requires only that the conduct affect a person engaged in export trade in the United States, the proviso limits recovery under the Sherman Act to such persons. The majority's reading of 6a(2) renders this proviso redundant, since it requires that the effect on the exporter in the United States "give[ ] rise to" the plaintiff's claim--in other words, that the person engaged in export trade be the plaintiff.

[6] Courts have long held that private plaintiffs "must prove the existence of 'antitrust injury' " to recover under section 4 of the Clayton Act. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990). In *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), the Supreme Court noted that the plaintiffs "must show that the conspiracy caused them an injury for which the antitrust laws provide relief." *Id.* at 584 n. 7, 106 S.Ct. 1348. The Court explained that a "cognizable injury" is an "antitrust injury." *Id.* at 586, 106 S.Ct. 1348.

Thus, the literal text does not require that the effect on United States commerce give rise to the plaintiff's claim. At worst, the text is sufficiently ambiguous to allow for both the construction the majority offers and the construction I believe is correct. At the least, the majority cannot find support in a plain text argument.

Accepting that the text of the FTAIA compels neither the majority's reading or mine, we must enlist other aids in determining the meaning of the statute. In doing so, I conclude that the textual conclusion that "a" means "a" is supported by the statutory context of the FTAIA, which describes the function of the FTAIA and its animating purpose, and by the purposes of the antitrust laws in general; by the legislative history of the FTAIA; and by the sparse case law that interprets the FTAIA.

B

The FTAIA was enacted as Title IV of Public Law 97-290, entitled "Export Trading Company Act of 1982."[8] Title I contains the congressional findings. Every single congressional finding relates to the importance of export business and the need to encourage export activity by American business.[9] The statute then states: "It is the purpose of this Act to increase United States exports of products and services by encouraging more efficient provision of export trade services to United States producers and suppliers, in particular by ... modifying the application of the antitrust laws to certain export trade."[10] It could not be clearer that the FTAIA serves to exempt exporting from antitrust scrutiny, not to limit the liability of participants in transnational conspiracies that affect United States commerce.[11]

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[7] The Clayton Act requires that *the plaintiff* suffer antitrust injury. The FTAIA, by contrast, requires that the United States suffer antitrust injury. *Compare* Clayton Act, 15 U.S.C.A. § 15(a) (providing cause of action to anyone "injured in *his* business or property by reason of anything forbidden in the antitrust laws") (emphasis added), *with* FTAIA, 15 U.S.C.A. § 6a(2) ("gives rise to *a* claim under the [Sherman Act]") (emphasis added). When a private plaintiff wishes to sue under the Clayton Act, the Clayton Act and FTAIA erect complementary requirements: the plaintiff must suffer antitrust injury, and persons in United States commerce must suffer antitrust injury. The majority opinion, on the other hand, appears to conflate these two concepts.

[8] Export Trading Company Act of 1982, Pub.L. No. 97-290, 96 Stat. 1233 (codified in scattered sections of 15 U.S.C.).

The text of the FTAIA implements this purpose perfectly. The Sherman Act, prior to the enactment of the FTAIA, applied to conduct that affected domestic, import, and export commerce. Recall that section 6a(1) limiting the reach of the

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[9] Export Trading Company Act of 1982 § 102, 96 Stat. at 1233-34.

[10] § 102(b), 96 Stat. at 1234. The Third Circuit has recently cited this language in concluding that "Congress enacted the FTAIA for the purpose of facilitating the export of domestic goods by exempting export transactions that did not injure the United States economy from the Sherman Act and thereby relieving exporters from a competitive disadvantage in foreign trade." *Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62, 71 (3d Cir.2000).

[11] Because the language of the statute is clear, we need not resort to its legislative history to discern its purpose. In any case, the legislative history only reiterates this single, motivating purpose. *See* H.R.Rep. No. 97-686, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.C.C.A.N. 2487, 2487 (describing the legislation as "the bill . . . to exclude from the application of [the antitrust laws] certain conduct involving exports" and "one of several bills ... that seek to promote American exports"). The excerpt of legislative history upon which the majority relies, that the purpose of the law is "to more clearly establish when antitrust liability attaches to international business activities," is certainly a true statement, but it expresses the purpose of the law at a level of generality that offers us no guidance on the narrow question we face. What the majority has overlooked is that Congress has spoken with much more particularity as to the purpose of this law: the purpose of the FTAIA is to promote exports by exempting American exporting activity from the antitrust laws.

Sherman Act applies to conduct that affects (1) domestic commerce; (2) import commerce; or (3) export commerce, but only to the extent that American exporters are affected. One class of conduct is excluded: conduct that affects only foreign purchasers of American exports. This is the function of the FTAIA: to protect American exporters who monopolize or conspire to restrain export trade that does not harm United States commerce.

The purpose of the FTAIA offers no support for the majority's reading of the statute. It is undisputed that if proved, the conspiracy in this case would have direct, substantial, and reasonably foreseeable effects upon United States commerce. No American exporters are implicated by this suit. American exporting business can only be harmed by the alleged conspiracy in this case.

Indeed, interpreting the FTAIA as the majority wishes will impair the competitiveness of American exporters. Under the majority's view, an American cartel that fixes prices worldwide will be subject to Clayton Act suits by plaintiffs from around the world,[12] but a foreign cartel that fixes prices worldwide will be subject to suit under the Clayton Act only from plaintiffs injured in American commerce. This interpretation of the FTAIA transforms a safe harbor for American exporters into a boon for foreign cartels that restrain commerce in the United States.

With respect to my colleagues, I fear that their reading of the FTAIA will hinder its purposes and reduce the effectiveness of the antitrust laws. Nothing in the text of the FTAIA, or the Export Trading Company Act of 1982 as a whole, or its legislative history, casts doubt on the importance of deterring restraints of trade that affect United States commerce. The Supreme Court has repeatedly recognized that the accent of the Sherman and the Clayton Acts is deterrence, requiring violators to pay full, treble damages, even if some plaintiffs gain a windfall or are foreigners. For example, in *Illinois Brick Co. v. Illinois,*[13] the Supreme Court noted the importance of "vigorous private enforcement of the antitrust laws" and "deterring violators" and recognized that "from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as some one redresses the violation."[14]

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[12] This cannot seriously be disputed. The FTAIA does not alter the holding of *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978), which allowed foreign governments to sue an American cartel that charged supra-competitive prices for pharmaceuticals worldwide. The legislative history approves of *Pfizer*. *See* H.R.Rep. No. 97-686, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2495.

The Supreme Court in *Pfizer, Inc. v. Government of India*[15] addressed a situation somewhat analogous to this case. The government of India sued several American pharmaceutical manufacturers under the Clayton Act for damages caused by a price-fixing conspiracy. Like Statoil, the government of India alleged a worldwide conspiracy that raised prices in the United States and abroad. Unlike in this case, in *Pfizer* the sales were made in the United States.[16] In holding that foreign governments could recover under the Clayton Act, Justice Stewart observed: "Treble-damage suits by foreigners who have been victimized by antitrust violations clearly may contribute to the protection of American consumers.... [A]n exclusion of all foreign plaintiffs would lessen the deterrent effect of treble damages."[17]

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[13] 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977).

[14] *Id.* at 745-46, 97 S.Ct. 2061, *quoting id.* at 760, 97 S.Ct. 2061 (Brennan, J., dissenting).

[15] 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978).

[16] Because of this, *Pfizer* is distinguishable from this case, since one can argue, as the majority does, that the injury to the foreign plaintiff occurred in the United States. But there is nothing in the reasoning of *Pfizer* that suggests that the facts of *Pfizer* define the outer limit of the antitrust laws. Further, even if we assume that the plaintiffs in *Pfizer* were injured in the United States, they were injured as buyers in an export transaction from the United States. Under section 6a(1)(B) and the majority's reading of the section 6a(2), injuries to buyers of American exports do not create jurisdiction under the antitrust laws. Yet the legislative history of the FTAIA cites *Pfizer* with approval. *Pfizer* maintains its force after the FTAIA because the conspiracy in *Pfizer* also affected Americans in domestic commerce. This is why section 6a(2) states "gives rise to a claim" and not "gives rise to the plaintiff's claim."

The logic underlying this conclusion is straightforward. Conspirators facing antitrust liability only to plaintiffs injured by their conspiracy's effects on the United States may not be deterred from restraining trade in the United States. A worldwide price-fixing scheme could sustain monopoly prices in the United States even in the face of such liability if it could cross-subsidize its American operations with profits from abroad. Unless persons injured by the conspiracy's effects on foreign commerce could also bring antitrust suits against the conspiracy, the conspiracy could remain profitable and undeterred.

It is no rejoinder that conspirators would simply choose to exclude the United States from any price-fixing conspiracy as long as American plaintiffs could sue. In at least some cases, including the United States in a price-fixing conspiracy is necessary to generate monopoly profits. Otherwise, arbitrage would rapidly equalize unequal prices around the globe as speculators resold goods purchased in the United States to buyers in high-price regions.[18] Thus, a cartel may find it impossible to fix prices anywhere without a worldwide conspiracy. The Sherman Act can only deter these violations if it protects all parties injured by such a conspiracy.

Justice Stewart succinctly made this argument in *Pfizer:*

> The conspiracy . . . operated domestically as well as internationally. If foreign plaintiffs were not permitted to

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[17] *Id.* at 314-15, 98 S.Ct. 584.

[18] For a real-life example of an arbitrage attempt, see *Eurim-Pharm GmbH v. Pfizer, Inc.*, 593 F.Supp. 1102, 1104 (S.D.N.Y.1984) (describing how antitrust plaintiff attempted to arbitrage pharmaceuticals by repackaging drugs purchased in England for sale in Germany).

seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home. If, on the other hand, potential antitrust violators must take into account the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators.[19]

C

The legislative history also supports this reading of the statute and undermines the majority's interpretation of section 6a(2). The Committee Report on the House bill that became the FTAIA states that the FTAIA

> does not exclude all persons injured abroad from recovering under the antitrust laws of the United States. A course of conduct in the United States--*e.g.*, price fixing not limited to the export market--would affect all purchasers of the target domestic products or services, whether the purchaser is foreign or domestic. The *conduct* has the requisite effects in the United States, even if some purchasers take title abroad or suffer economic injury abroad.[20]

This statement explicitly refers to plaintiffs who "suffer economic injury abroad." The majority's interpretation of the statute is contrary to this statement in the legislative history. The "effect" on United States commerce is the injury suffered by purchasers in the United States; this effect does not give rise to the injury suffered by the foreign plaintiffs. Yet the legislative history contemplates such plaintiffs recovering under the Sherman Act. The scenario described in this statement is virtually identical to the instant case: a conspiracy sells to buyers in the United States and abroad, and each of the buyers is injured. All are injured by the same conspiracy, and it is a conspiracy that has been injurious to competition in the United States.

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[19] 434 U.S. at 315, 98 S.Ct. 584 (footnote omitted).

[20] H.R.Rep. No. 97-686, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.C.C.A.N. 2487, 2495 (emphasis in original), *citing Pfizer, Inc. v. Government of India*, 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978).

The majority, however, chooses to rely on the following statement in the same House Report:

> A transaction between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws.... It is thus clear that wholly foreign transactions as well as export transactions are covered by the [FTAIA], but that import transactions are not.[21]

That American ownership alone should not create jurisdiction over a wholly foreign conspiracy is not controverted, controversial, or relevant to this case. What is relevant is that the language omitted from the quotation above states that if a conspiracy between two foreign firms, regardless of American ownership, does have an effect on domestic commerce, there is jurisdiction.[22]

D

I recognize that there is little precedent to guide our analysis of this question. Of the case law that does exist, there are no appellate court cases supporting the majority's holding. To the contrary, the majority must reconcile or distinguish the only other circuit court decisions interpreting the FTAIA, because all of them find jurisdiction present.

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[21] *Id.* at 2494-95.

[22] *Id.* ("Such foreign transactions should, for the purposes of this legislation, be treated in the same manner as export transactions-- that is, there should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor.").

The majority opinion struggles, and I believe fails, to reconcile *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC,*[23] which involved a foreign plaintiff alleging monopolization in radio advertising in the Caribbean by a competing radio station. The defendant was also a foreign entity. Consistent with the reasoning of this dissent, the D.C. Circuit held that the FTAIA did not preclude jurisdiction, because the plaintiff showed that the foreign defendants' conduct had the effect of harming United States purchasers of advertising. It stated: "the alleged injury is to advertisers in the United States."[24] Thus, based on the injury to advertisers in the United States, the court found jurisdiction over a suit by a radio broadcaster in the Caribbean. The D.C. Circuit did not require that the injury to American advertisers "give[ ] rise to" the plaintiff's cause of action; its determination that the injury gave rise to "a" claim was sufficient.

E

Finally, the majority's attempt to enlist the aid of the Commerce Clause and the canon of construction that creates a presumption against extraterritoriality is mistaken.

The majority suggests that the interpretation of the FTAIA that I espouse is beyond the power of Congress to regulate commerce.[25] The Supreme Court itself has recognized--in the context of the Sherman Act--that Congress has intended to regulate, and constitutionally has regulated, foreign conduct that affects United States commerce.[26] And it has been decades since any court has taken so cramped a view of the Commerce Clause in any context.[27]

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[23] 148 F.3d 1080 (D.C.Cir.1998).

[24] *Id.* at 1086.

[25] *See* Majority Op. at 426 n.18.

[26] *Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 796, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993) ("[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.").

The majority is correct to note that the courts' historical willingness to apply the Sherman Act extraterritorially is not dispositive of this appeal, since the FTAIA, and not the courts' earlier interpretations of the Sherman Act, is controlling here.[28] But precisely because the FTAIA applies here, the majority's reliance on the canon against extraterritorial application of statutes is misplaced. This canon operates when Congress has not clearly spoken on the issue of extraterritoriality.[29] The FTAIA, however, explicitly addresses nothing other than extraterritoriality. We must be careful not to use such a canon when Congress is speaking directly to the relevant issue. Make no mistake: such canons reflect substantive presumptions about the content of laws. If courts apply substantive canons of construction against statutes that do speak to an issue, then it is the courts, not Congress, who are making the policy choices that form the content of legislation.[30]

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[27] *See, e.g., United States v. Lopez*, 514 U.S. 549, 552-59, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (recounting the development of Commerce Clause jurisprudence in the domestic context).

[28] *See* Majority Op. at 423-24.

[29] *See E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) ("This 'canon of construction ... is a valid approach whereby unexpressed congressional intent may be ascertained .' ... In applying this rule of construction, we look to see whether 'language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage [extraterritorially].'").

[30] In any case, when Congress enacted the FTAIA, is was legislating against a backdrop of extraterritorial application of the Sherman Act; thus we cannot presume that Congress treated non-extraterritoriality as the default condition. *See Hartford Fire Ins.*, 509 U.S. at 796, 113 S.Ct. 2891 ("[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States ."); *id.* at 814, 113 S.Ct. 2891 (Scalia, J., dissenting) ("[I]t is now well established that the Sherman Act

II

Because I disagree with the majority's interpretation of the FTAIA, I would reach the standing inquiry. It is straightforward; this court has restated the test for standing under the Clayton Act as "1) injury-in-fact, an injury to the plaintiff proximately caused by the defendants' conduct; 2) antitrust injury; and 3) proper plaintiff status, which assures that other parties are not better situated to bring suit."[31]

Statoil has standing. First, it has suffered injury-in-fact. It paid inflated prices directly to the defendants.

Second, Statoil has suffered antitrust injury. Antitrust injury requires that the injury to the plaintiff not merely show "injury causally linked to an illegal presence in the market" but injury "attributable to an anti-competitive aspect of the practice under scrutiny."[32] This element of standing excludes plaintiffs, primarily competitors, harmed by increased, rather than decreased, competition.[33] Statoil's injury was the direct

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applies extraterritorially."); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n. 6, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962).

[31] *Doctor's Hospital of Jefferson, Inc. v. Southeast Medical Alliance, Inc.*, 123 F.3d 301, 305 (5th Cir.1997). For further discussion, see *McCormack v. NCAA*, 845 F.2d 1338, 1341 (5th Cir.1988); *see also Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977).

[32] *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990), *quoting Brunswick*, 429 U.S. at 489, 97 S.Ct. 690.

[33] *See Atlantic Richfield*, 495 U.S. at 334, 337-38, 110 S.Ct. 1884; *Brunswick*, 429 U.S. at 488-89, 97 S.Ct. 690.

result of the alleged price-fixing conspiracy and consequent restraint of trade.[34]

Third and finally, Statoil is a proper plaintiff. In determining whether a party is a proper plaintiff, it should examine "such factors as (1) whether the plaintiff's injuries or their causal link to the defendant are speculative, (2) whether other parties have been more directly harmed, and (3) whether allowing this plaintiff to sue would risk multiple lawsuits, duplicative recoveries, or complex damage apportionment."[35]

First, neither Statoil's injuries, nor their connection to the defendants, is speculative. The injuries arise from the defendants charging Statoil monopoly prices. Second, other parties have not been harmed more directly than Statoil. Statoil was a purchaser in the market for heavy-lift barge services, the market in which the defendants fixed prices. Third, allowing Statoil to sue would not risk duplicative recoveries or the like. There is no suggestion that any unnamed party can seek to recover for the same damages Statoil suffered.

III

The antitrust laws have always given federal courts jurisdiction over conspiracies that adversely affect competition in the United States. The FTAIA limits that jurisdiction; but it does so by exempting American export conspiracies, not foreign conspiracies that injure American competition.

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[34] Appellees rely heavily on the antitrust injury requirement in arguing that Statoil lacks standing. Their argument that Statoil's injury was not caused by high prices charged to U.S. consumers misconstrues the antitrust injury requirement. Antitrust injury does not limit standing to U.S. consumers but to anti-competitive injuries. *See Doctor's Hospital*, 123 F.3d at 305-06; *see also Blue Shield of Virginia v. McCready*, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982).

[35] *McCormack*, 845 F.2d at 1341.

The majority opinion expresses concern that foreign litigants will flock to the United States for redress of their injuries in distant lands. The majority opinion, and the district court opinions it cites, seem to fear that the interpretation of the FTAIA that Statoil advocates makes the Sherman Act an antitrust regulation of foreign economies throughout the entire world, a paternalistic lawmaking enterprise that ignores the adequacy of foreign tribunals. But Congress has enacted no such thing. Congress enacted the FTAIA to serve the United States' narrow interest in vigorous domestic competition.

The text of the FTAIA may be inelegant, but it serves the selfish national interests of the United States: the FTAIA excludes from antitrust liability all conduct that has caused no antitrust injury to the United States economy;[36] but it enlists all injured parties--foreign or domestic--to assist the Department of Justice in deterring conduct that does harm the forces of competition in the United States. When a conspiracy causes a direct and substantial injury to competition in the United States, the Clayton Act recruits private parties to supplement the efforts of the Department of Justice in ending the conspiracy. The FTAIA ensures that parties injured by foreign aspects of the same conspiracy that harms American commerce are part of the phalanx of enforcers brought to bear by the Clayton Act. Thus, treble damages suits by parties who suffer antitrust injury from a conspiracy that has a direct and substantial harmful impact on United States commerce serve a single function: the protection of United States commerce. The FTAIA threatens no parade of horribles--it does nothing more than zealously protect competition in the United States while sparing from the docket of American courts suits involving conspiracies that affect only foreign economies.

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[36] Indeed, the fact that the FTAIA protects American exporters from antitrust liability for conduct that restrains export trade indicates that the FTAIA is not concerned with regulating foreign economies.

In sum, I believe the FTAIA does not divest the federal courts of jurisdiction over suits by plaintiffs who suffer antitrust injuries from a conspiracy that also harms competition in United States commerce. Whether the harm felt in the United States is the source of the injury to the plaintiff is irrelevant; it is the effects on the United States that creates jurisdiction. Under the facts of this case, I would conclude that the district court had jurisdiction over the suit and that Statoil had standing to sue the defendants under the Clayton Act. I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-98-4274

DEN NORSKE STATS OLJESELSKAP A.S.,
Plaintiff,

vs.

HEEREMAC; v.o.f.; HEEREMAC MARINE CONTRACTORS; HEEREMA OFFSHORE SERVICES U.S., INC.; HEEREMA OFFSHORE CONSTRUCTION GROUP, INC.; JAN MEEK; PIETER HEEREMA; MCDERMOTT INTERNATIONAL INC.; MCDERMOTT INCORPORATED; J. RAY MCDERMOTT, INC.; J. RAY MCDERMOTT, INC. S. A.; MCDERMOTT ENGINEERS & CONSTRUCTORS (USA), INC.; MCDERMOTT ENGINEERING HOUSTON, L.L.C.; J. RAY MCDERMOTT GULF CONTRACTORS, INC.; MCDERMOTT-ETPM INC.; SAIPEM SpA; SAIPEM INTERNATIONAL BV; SAIPEM UK LIMITED; and SAIPEM (PORTUGAL) -- COMERCIO MARITIMO, SOCIEDADE UNIPESSOAL, S.A.,
Defendants.

MEMORANDUM AND ORDER OF DISMISSAL

Pending before the Court in the above referenced action, alleging violations of United States antitrust law, specifically Sections 1 and 2 of the Sherman Act, and common law causes of action for fraud and fraudulent inducement, tortious interference with prospective business advantage, and civil conspiracy arising out of a global conspiracy and attempted monopolization of heavy-lift marine construction and installation services and related services, involving unlawful market allocation, price fixing, and bid rigging, are the following motions:

(1) Defendants Saipem SpA, Saipem International, B.V., Saipem UK Limited, and Saipem (Portugal) - Comercio Maritimo, Sociedade Unipessoal, S.A.'s (collectively, "Saipem Defendants'") motion to dismiss under Federal Rule 12 (b) (instrument #26);

(2) Defendants McDermott International, Inc., J. Ray McDermott, Inc., J. Ray McDermott, S.A., McDermott Engineers and Constructors (USA), Inc., McDermott Engineering Houston, L.L.C., J. Ray McDermott Gulf Contractors, Inc., and McDermott-ETPM, Inc.'s (collectively, "the McDermott Defendants'") motion to dismiss pursuant to Rules 12(b) (1) and 12(b) (6) (#27);

(3) Defendants Heerema Marine Contractors Nederland B.V., Heerema Offshore Services U.S., Inc., and Heerema Offshore Construction Group, Inc.'s (collectively, "Heerema Defendants'") motion to dismiss pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure (#28);

(4) Plaintiff Den norske stats oljeslskap's ("Statoil's")[1] motion to stay (#30) proceedings until resolution of the motions to dismiss;

(5) McDermott Defendants' cross-motion for immediate dismissal or acceleration (#32), joined by Heerema Defendants (#35);

(6) Saipem Defendants' motion to accelerate (#34);

(7) Heerema Defendants' motion for immediate dismissal (#35).

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[1] Statoil is proceeding individually and on behalf of each of the ventures and other participants in oil and gas ventures located in the North Sea, of which Statoil is the operator.

According to Statoil's first amended complaint (#21), pursuant to its business of exploring for, producing, refining, transporting and selling crude oil, natural gas, and other petroleum products, since 1988 Statoil has contracted with Defendants to design, engineer, fabricate, transport, and install or remove offshore structures required for offshore production and transportation of these petroleum products. Statoil emphasizes that the global market for the provision of heavy lift derrick barges and related marine construction and transport services has been dominated by a handful of companies, Defendants here, during the period at issue (approximately 1993-1997[2]), with fewer than ten of the much

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[2] In 1993 a criminal complaint was filed against Defendants HeereMac and Jan Meek alleging that they and unnamed others had combined and conspired "to suppress and eliminate competition by rigging bids for the sale of heavy-lift derrick barge and related marine construction services in the United States and elsewhere" from "at least as early as 1993 and continuing until May 1997." Criminal Information, Ex. A to First Amended Complaint. HeereMac and Jan Meek pled guilty to the criminal information on December 23, 1997 and agreed to pay fines of $49 million and $100,000 respectively. Ex. B, Transcript of guilty plea hearing. Plaintiffs here and in Phillips claim that only when the criminal case became public did they learn of the conspiracy.

HeereMac provided heavy-lift marine construction services to customers in three distinct geographic markets--the Mahogany platform in the Gulf of Mexico, several platforms in the North Sea, and the Xijiang platform off the coast of China in the Far East. The plea agreement addressed separately issues related to commerce affected by HeereMac's conduct in the Gulf of Mexico and commerce affected by HeereMac's conduct in the North Sea and Far East. Thus issues regarding price fixing activities in the Gulf of Mexico and in the north Sea were treated separately. Moreover, in the plea agreement HeereMac contended that the Department of Justice would not be able to establish (1) how conduct related to foreign commerce violated the United States antitrust laws and (2) how this foreign conduct affected United States commerce for purposes of the Federal Sentencing Guidelines. The Department of Justice, moreover, admitted establishing liability for foreign conduct would be difficult. The plea agreement makes no reference to the Hewett or Judy projects in the North Sea, does not suggest that those projects were part of any conspiracy, does not admit that activity or projects in the North Sea needed heavy-lift derrick barges existing in the world, most or ill of which are owned or controlled by Defendants. Although holding themselves out as competitors in the relevant market, Defendants allegedly have conspired and illegally combined outside the United States to eliminate or lessen competition and exert monopoly power throughout the world, including the North Sea, the United States, and the Gulf of Mexico, by price fixing, bid rigging, dividing markets, and allocating customers, resulting in higher prices and limited alternative access to such services. Thus Defendants' bids on projects worldwide were not competitive, but were rigged and were substantially and artificially inflated.

Relevant to the issue of subject-matter jurisdiction here, Statoil is a Norwegian corporation with its principal place of business in Norway and is the operator of and working interest owner in several oil and gas production facilities in the North Sea. While the first amended complaint conclusorily asserts that this global conspiracy was intended to and did have a foreseeable and substantial effect on United States foreign and interstate commerce, including that of the

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had a "direct, substantial and foreseeable" effect on United States commerce, and alone does not establish the existence of a conspiracy.

In Phillips, this Court concluded that the collateral estoppel effect of the guilty plea is

> limited to HeereMac's admission that it was a participant in a price-fixing conspiracy involving heavy lift marine construction services in the major oil producing regions of the world (the Gulf of Mexico, the North Sea, and the Far East) from 1993 through 1997 and that $65,000,0000 in commerce in the Gulf of Mexico was affected. The guilty plea and conviction do not establish the extent of the Court's jurisdiction here, that liability exists as to the Phillips jobs at issue here or that other Defendants here were involved in the conspiracy. It does not establish that the conspiracy caused antitrust injury to these named Defendants, nor, if it did, what damages are appropriate.

state of Texas,[3] it makes clear that Statoil's business was exclusively in the North Sea and that Statoil's injuries and "damages have been incurred in connection with projects in the Norwegian Sector of the North Sea . . . ." First Amended Complaint at 2. There is no direct, substantial connection between the United States commerce and Statoil's claims. It has not alleged that it has any United States subsidiaries, any platforms in United States waters, or any business in the United States.

The instant action is one of several pending in this district that have arisen out of the same alleged conduct of conspiracy and attempted monopolization in the heavy-lift marine construction industry. One of these suits, Phillips Petroleum Company et al. v. HeereMac, v.o.f., et al., H-98-CV-1697 (consolidated with H-98-CV-1698), is also on the undersigned judge's docket. The Defendants in Phillips are the same as those here with a few additions, while counsel for Statoil represented the Phillips plaintiffs in H-98-CV-1697. The jurisdictional allegations are very similar in the two suits. Furthermore the parties here have referenced their briefs and the Court's order of January 22, 1999 (#128) in Phillips in support of their arguments in this suit. At issue in both cases inter alia is the scope of exraterritorial subject-matter jurisdiction of United States antitrust law, specifically the Sherman Act, 15 U.S.C. §§ 1 and 2.[4] Because the Court's ruling in Phillips is dispositive of this case, the Court addresses only that jurisdictional matter, reiterates its ruling, applies it to the facts here, and explains the reasons why, as a matter of law, it concludes that Defendants' motions to dismiss in the instant case should be granted.

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[3] Statoil, referring to the complaint (#21) that it amended after the Court's order issued in Phillips, asserts at p. 4 of its Consolidated Response to Defendants' Motions to Dismiss (#41),

> ...Defendants' conspiracy had a substantial effect on U.S. foreign and interstate commerce by reducing the supply of crude oil production in the North Sea, which in turn increased the prices paid by U.S. consumers for North Sea crude oil, a significant source of U.S. supply. Complaint at ¶ ¶ 52, 78. Further, many of the licensees of the affected North Sea projects of which Statoil is the operator include subsidiaries of U.S. oil companies.
>
> Preamble to Complaint; Statoil's Supplemental Disclosure of Interested Persons dated February 4, 1999. These subsidiaries have suffered their pro rata share of applicable damages as a result of the increase in prices of heavy lift services and they will enjoy a corresponding share of Statoil's recovery in this litigation . Complaint at ¶ ¶ 70-81.

A foreign party may sue for damages under the Sherman Act for antitrust conduct occurring outside the United States only where the conduct is meant to produce and does produce a "direct, substantial, and reasonably foreseeable effect" within the United States. Foreign Trade Antitrust

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[4] Sections 1 and 2 of the Sherman Act, prohibit restraints of trade, monopolization and attempts to monopolize.

Section 1 of the Sherman Act reads,

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding ten million dollars if a corporation, or, if any other person, three hundred fifty thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1. Section 2 of the Sherman Act provides,

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding ten million dollars if a corporation, or, if any other person, three hundred fifty thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2.

Improvements Act of 1982 ("FTAIA"), 15 U.S.C. § 6a[5]; Hartford Fire Ins. Co. v. California, 509 U.S. 769 (1993).

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[5] The FTAIA was added to the Sherman Act in 1982. Although the Sherman Act, 15 U.S.C. §§ 1-2, prohibits monopolization and attempted monopolization of any line of interstate or foreign Commerce, section 1 of the FTAIA, 15 U.S.C. § 6a, restricts and makes it inapplicable to certain kinds of commerce. The FTAIA provides in relevant part,

> [Section 1-7 of the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect--
>
> (A) on trade or Commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of [this Act], other than this section.
>
> According to an additional proviso, if sections 1 to 7 of this title apply to such conduct only because of the operation of 1 (B), then sections 1-7 of this title shall apply to such conduct only for injury to export business in the United States.

Here, clause 1(A), rather than 1(B), of the FTAIA governs, so the location of the Defendants as suppliers of services is not relevant to the question of whether the alleged Conspiracy directly, substantially and reasonably foreseeably affected United States commerce.

The FTAIA was intended to exempt from United States antitrust law any conduct that lacks the requisite domestic effect, even where such conduct originates in the United States or involves United States-owned entities operating abroad. Eurim-Pharm GmbH v. Pfizer, Inc., 593 F. Supp. 1102, 1106 (S.D.N.Y. 1984); McGlinchy v. Shell Chemical Co., 845 F.2d 802, 813 (9th Cir. 1988) (finding allegations of refusal to deal in foreign markets which injured only foreign customers and plaintiff insufficient to confer antitrust jurisdiction under the FTAIA); The "In" Porters, S.A. v. Hanes Printables, Inc., 663 F. Supp. 494, 498-99 (M.D.N.C. 1987) (finding that French garment distributor had no cause of action under United States antitrust laws absent evidence of injury in the

The Court quotes the following relevant sections from its memorandum and order in Phillips, pp. 174-81:

> Federal courts are courts of limited jurisdiction, which encompasses only cases authorized by the Constitution and laws of the United States. Coury v. Prot, 85 F.3d 244, 248 (5th Cir. 1996).
>
> Because the reach of United States antitrust statutes is a matter of law, the Court can address the matter now. "A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries." Continental Ore, 370 U.S. at 704.
>
> There is not a clear, rigid test for determining extraterritorial subject matter jurisdiction under the federal antitrust statutes. A brief review of the modern development of the case law reveals the general scope and factors applied in determining whether jurisdiction exists. Although the Sherman Act by its own terms applies to commerce with foreign nations, originally the statute was interpreted as not providing for jurisdiction based solely on conduct taking place abroad. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). In United States v. Aluminum Co. of America, 148 F.2d 416, 444 (2d Cir. 1945) (holding that the Sherman Act applies to agreements made in foreign jurisdictions outside of the United States "[i]f they were intended to affect imports and did affect them"), Judge Learned Hand laid the

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United States); Liamuiga Tours v. Travel Impressions, 617 F. Supp. 920, 924 (E.D.N.Y. 1985) (finding lack of jurisdictional nexus under the FTAIA where restraint of trade and conspiracy claims involved lost business and anti-competitive effects exclusively in St. Kitts); P. Areeda & H. Hovenkamp, Antitrust Law ¶ 236a (1993 Supp.).

groundwork for what became known as the "effects" test applied today. The test was gradually adopted in some version by most courts.

Because of its expansive scope, considerations of international comity in the face of protest by other countries came to bear on the assertion of extraterritorial jurisdiction. In Timberlane Lumber Co. v. Bank of America National Trust & Savings Ass'n, 549 F.2d 597, 613 (9th Cir. 1976), the Ninth Circuit in an influential opinion established a balancing test including comity factors for defining the scope of jurisdiction over foreign defendants: a court must find "some effect--actual or intended--on American foreign commerce," must decide whether that effect is "sufficiently large to present a cognizable injury," and must determine "whether the interests of, and links to, the United States--including the magnitude of the effect on American foreign commerce--are sufficiently strong vis-a-vis those of other nations, to justify an assertion of extraterritorial authority." For the third prong, the Ninth Circuit set out seven factors to aid in determining whether subject matter jurisdiction should be found: (1) the degree of conflict with foreign law or policy; (2) the nationality, location and principal places of business of the parties; (3) the extent to which enforcement by either country can achieve compliance; (4) the relative significance of effects on the United States as compared with those elsewhere; (5) the existence of intent to harm or affect American commerce; (6) the foreseeability of such effect; and (7) the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. Id. at 614-15. Other courts, including the Fifth Circuit, adopted similar comity-informed analyses regarding subject matter jurisdiction. Industrial Inv. Dev. Corp. v. Matsui & Co., 671

F.2d 876 (5th Cir. 1982), vacated on other grounds, 460 U.S. 1007 (1983) (remanded for review of standing issues in light of Associated General Contractors, 459 U.S. 519), on remand, 704 F.2d 709 (5th Cir. 1983), cert. denied, 464 U.S. 961 (1983); Montreal Trading, Ltd. v. Amax, Inc., 661 F.2d 864 (10th Cir. 1981); In re Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979). See also American Rice, Inc. v. Arkansas Rice Growers Co-op. Ass'n, 701 F.2d 408, 413 (5th Cir. 1983) (citing Timberlane, Mannington Mills, and In re Uranium for examinations of the extraterritorial reach of the Sherman Act). Actually, distinguishing its view from that of the Ninth Circuit and agreeing with the Third Circuit majority in Mannington Mills and the Seventh Circuit In re Uranium, the Fifth Circuit did not read the Timberlane test as a test for subject matter jurisdiction, but stated that "[a] district court should not apply the antitrust laws to foreign conduct or foreign actors if such application would violate principles of comity, conflicts of law, or international law," which, "when applicable, prevents the court from entertaining a claim." 671 F.2d at 8-9 and n.7. In doing so, it emphasized the definition of subject matter jurisdiction established by Bell v. Hood, 327 U.S. 678 (1946), which does not embrace "[t]he wide-ranging inquiry suggested by Timberlane and its progeny." Id. The Fifth Circuit made clear that, unlike the panel in In re Uranium, it did not conclude that the trial judge has discretion in deciding whether to entertain an antitrust suit and that the decision not to utilize the antitrust laws "must be based on solid legal ground." Id.

Other courts have rejected any comity restrictions. Laker Airways v. Sabena Belgium

World Airlines, 731 F.2d 909 (D.C. 1984); National Bank of Canada v. Interbank Card Ass'n, 666 F.2d 6 (2d Cir. 1981) (requiring only proof of actual anticompetitive effects in the United States). In actual practice, subject matter jurisdiction is rarely declined by United States Courts when there is more than a de minimis effect on United States Commerce. Irving Scher, ed., I Antitrust Advisor 6-10 (4th ed., West 1998).

Thus the Sherman Act . . . can apply to projects outside the United States as long as there is a direct, substantial, reasonably foreseeable effect on United States commerce. The Supreme Court in 1993 observed that it is well established that the Sherman Act "applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." Hartford Fire Ins., 509 U.S. at 796. It further noted that "[t]he only substantial question in this case is whether 'there is a true conflict between domestic and foreign law.'" [It then concluded there was no actual conflict because there was no showing of conflict between United States and the relevant foreign countries' laws.] . . . .

After reviewing the pleadings and the applicable law, the Court finds that Plaintiffs have alleged a conspiracy, within the ambit of the Sherman Act, of a number of foreign and domestic entities that had a direct, substantial and reasonably foreseeable effect on United States commerce, i.e., on consumers in the United States, including Phillips Petroleum Company, relating to the Mahogany project in the territorial waters of the United States in the Gulf of Mexico, where a significant part of the conspiracy targeted restraints on competition over heavy lift marine construction services. Indeed, HeereMac was allegedly given exclusive rights to service this area by the conspiracy. Phillips has made allegations that the McDermott Defendants, headquartered in New Orleans, Louisiana, and Heerema and Saipem Defendants, with offices in Texas and Louisiana from which they conducted significant business related to heavy lift marine services, participated in the conspiracy, as did the wholly owned, foreign-based subsidiaries of Phillips Petroleum Company, with resulting antitrust injury to Phillips Petroleum Company in regard to the Mahogany Platform job. . . .

Nevertheless, and this matter relates to the jurisdictional reach of the United States antitrust laws and to standing, while the Court finds that the allegations of Phillips Petroleum Company, a substantial, United States-based corporation, sufficiently state a claim that it has suffered actual injury, antitrust injury proximately caused by the conspiracy, and proper plaintiff status because it was allegedly directly and substantially injured by the conspiracy, the Court does not find that the claims of the foreign-based, wholly-owned Phillips subsidiaries (Phillips U.K., Phillips Norway, and Phillips China) regarding injuries sustained in relation to the foreign platforms (the Judy, the Hewett, the Ekofisk 2/4 J 2/4 X, and the Xijiang Platforms) have a direct and substantial effect on United States commerce. Although Phillips Norway was incorporated under the law of Delaware, the mere fact that an injured party might be a United States citizen or corporation is not enough to establish jurisdiction; the primary injury to that party must be caused in the United States and substantially affect United States commerce. Therefore the Court lacks subject matter jurisdiction over these claims under federal . . . antitrust law and they should be dismissed. [emphasis added]

In the instant case, Norwegian corporation Statoil's damages arise from its projects in the Norwegian sector of the North Sea. While the alleged foreign, global anticompetitive conspiracy to fix prices, rig bids, and allocate markets in the North Sea and resulting injuries to Statoil's projects in the North Sea may have very indirectly had an attenuated effect on projects in the United States and in its waters in the Gulf of Mexico, they did not have a direct, substantial, and reasonably foreseeable anticompetitive effect on United States trade or commerce.

Statoil's claims are therefore not within the ambit of the United States antitrust law. Statoil, a foreign corporation, works exclusively in the North Sea and alleges no United States subsidiary or business conduct in the United States.[6]

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[6] Even if the injured party is a United States citizen or corporation, that fact is not sufficient to establish jurisdiction. McGlinchy v. Shell Chemical Co, 845 F.2d 802 (9th Cir. 1988). Furthermore, a court should not exercise jurisdiction when the primary injury caused by the alleged anticompetitive activity occurs outside the United States. The "In" Porters, S.A. v. Hanes Printables, Inc., 663 F. Supp. 494, 499-500 (M.D.N.C. 1987) (French garment distributor has no cause of action under federal antitrust laws without evidence of injury within the United States and to United States interests operating abroad); S. Megga Telecommunications, Ltd. v. Lucent Technologies, Inc., No. 96-357-SLR, 1997 WL 86413 (D. Del. Feb. 14, 1997); Coors Brewing Co. v. Miller Brewing Co., 889 F. Supp. 1394, 1397 (D. Colo. 1995) (FTAIA interpreted by cases "to mean that with the exception of claims brought by domestic importers, the Sherman Act will, not apply to conduct affecting foreign markets, consumers or producers unless there is also a direct, substantial, and reasonably foreseeable effect on the domestic market (subsection (1) (A) or on opportunities to export from the United States ((1) (B)"); Optimum, S.A. v. Legent Corp., 926 F. Supp. 530 (W.D. Pa. 1996) (standard applies even when antitrust conduct involves United States-owned entities operating abroad); Caribbean Broadcast System, Ltd. v. Cable and Wireless P.L.C., No. 93-2050, 1995 WL 76164, *2 (D.D.C. Dec. 21, 1995) (FTAIA "makes clear that the concern of the antitrust laws is protection of American consumers and American exporters, not foreign consumers or producers"). Thus Statoil's argument that a number of licensees on the North Sea projects are subsidiaries of United States Oil companies in not enough to establish jurisdiction.

Because it does not trade in and because it was allegedly injured outside the United States by Defendants' bid rigging on jobs located in the Norwegian sector of the North Sea having no direct, substantial effect on United States commerce, Statoil lacks standing to bring a claim under United States antitrust laws because its alleged injuries are not of the type that the antitrust statute was intended to redress. United States antitrust laws do not extend to protect foreign markets from anticompetitive effects and "do not regulate the competitive conditions of other nations' economies." Matsushita Electric Industrial Co. v. Zenith Radio Corp.., 475 U.S. 574, 582 (1986). Thus this Court concludes that it does not have subject-matter jurisdiction over Statoil's claims of injury and damages based on Norwegian projects.

Because there is no federal question jurisdiction, the Court in its discretion also dismisses without prejudice the common law claims over which it had supplemental jurisdiction pursuant to 28 U.S.C. § 1367 (c) (3) ("The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . (3) the district court has dismissed all claims over which it has original jurisdiction"). Bass v. Parkwood Hosp., ____F.3d ____, 1999 WL 446608, *11 (5th Cir. July 1, 1999).

Accordingly, the Court

ORDERS that Defendants' motions to dismiss for lack of subject-matter jurisdiction are GRANTED and that this case is DISMISSED without prejudice. All remaining pending motions are MOOT.

SIGNED at Houston, Texas, this 9th day of July, 1999.

/s/______________________________
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 99-20763

DEN NORSKE STATS OLJESELSKAP AS
Plaintiff-Appellant,

v.

HEEREMAC VOF; HEERMA MARINE CONTRACTORS; HEEREMA OFFSHORE SERVICES US INC; HEEREMA OFFSHORE CONSTRUCTION GROUP INC; JAN MEEK; PIETER HEEREMA; MCDERMOTT INTERNATIONAL INC; MCDERMOTT INC; J RAY MCDERMOTT SA; J RAY MCDERMOTT INC.; J. RAY MCDERMOTT GULF CONTRACTORS INC; MCDERMOTT ENGINEERS & CONSTRUCTORS (USA) INC; MCDERMOTT ENGINEERING HOUSTON LLC; MCDERMOTT-ETPM INC; SAIPEM SPA; SAIPEM INTERNATIONAL BV; SAIPEM UK LIMITED; SAIPEM (PORTUGAL) – COMERCIO MARITIMO, SOCIEDADE UNIPESSOAL, SA
Defendants–Appellees.

Appeal from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Ojpinion 02/05/01, 5 Cir., _______, _______ F.3d _______)

Before JOLLY, HIGGINBOTHAM and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

Patrick E. Higginbotham:

That I did not ask for a poll of the court in this case should not be misread. I did not do so for the reason that with three active judges recused, it would, as a practical matter, be nigh futile. With 14 active judges, 8 votes are required to take a case en banc, regardless of the number of active judges that may be recused. With the votes of the panel and the three recusals, there are only eight potential votes. Seven of those eight would have to support a petition for rehearing en banc. Make no mistake. The questions posed by this case are of immense importance in what is now truly a world market. Our decision laid beside the decision of the D.C. Circuit leaves the law a muddled mess. An authoritative answer from the Supreme Court or the Congress is needed.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

Judges King, Jones, Duhe and Wiener did not participate in the consideration of the rehearing en banc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Criminal No.:

UNITED STATES OF AMERICA

v.

HEEREMAC, V.O.F.

Defendant.

PLEA AGREEMENT

Pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure ("Fed. R. Crim. P."), the United States of America and HEEREMAC, v.o.f., a partnership organized and existing under the laws of The Netherlands ("defendant"), hereby enter into this Plea Agreement:

RIGHTS OF DEFENDANT

1. The defendant understands its right:

(a) to be represented by an attorney;

(b) to plead not guilty to any criminal charge brought against it;

(c) to have a trial by jury, at which it would be presumed not guilty of the charge and the United States would have to prove it guilty beyond a reasonable doubt;

(d) to confront and cross-examine witnesses against it and to subpoena witnesses in its defense at trial;

(e) to be charged in the State and District where the offense occurred;

(f) as a partnership organized and existing under the laws of The Netherlands, to contest service of the Summons in this case, and to contest the jurisdiction of the United States to prosecute this case against it in the United States District Court for the Northern District of Illinois:

(g) to appeal its conviction, if it is found guilty at trial; and

(h) to appeal the imposition of sentence against it.

WAIVER OF RIGHTS AND OFFENSE CHARGED

2. The defendant waives the rights set out in Paragraphs 1(b)-(g) above, waives all jurisdictional defenses to the prosecution of this case, and agrees voluntarily to consent to the jurisdiction of the United States to prosecute this case against it in the United States District Court for the Northern District of Illinois. The defendant also waives the right to appeal the imposition of sentence against it, so long as such sentence is consistent with this Plea Agreement. Pursuant to Rule 7(b), Fed. R. Crim. P., the defendant will waive indictment and plead guilty to a one-count Information. The Information will charge that, beginning at least as early as 1993 and continuing until May 1997, the defendant participated in a conspiracy to suppress and eliminate competition by rigging bids for the sale of heavy-lift derrick barge and related marine construction (hereafter "heavy-lift marine construction") services in the United States, the North Sea and Far East, in violation of the Sherman Antitrust Act, 15 U.S.C. § 1.

3. Pursuant to the terms of this Plea Agreement, the defendant will plead guilty at arraignment to the criminal charge described in Paragraph 2 above, and will make a factual admission of guilt to the Court in accordance with Rule 11, Fed. R. Crim. P., as set forth in Paragraph 4 below.

FACTUAL BASIS FOR OFFENSE CHARGED

4. Had this case gone to trial, the United States would have presented evidence to prove the following facts:

(a) The defendant is, and from in or about 1989 until December 19, 1997 was, a concentrative joint venture organized as a partnership under the laws of The Netherlands. Defendant is, and throughout the period from in or about 1989 until December 19, 1997 was, a fifty-fifty partnership organized through subsidiaries between (a) the Heerema Offshore Construction Group Inc. ("Heerema"), a corporation organized and existing under the laws of Panama with its principal place of business in Geneva, Switzerland and (b) from 1988 to 1995, McDermott International, Inc. ("MII"), an unrelated U.S. corporation with its principal place of business in New Orleans, Louisiana, and from 1995 to 1997, J. Ray McDermott, S.A. ("JRM"), a Panamanian company with its principal place of business in Houston, Texas. JRM is sixty (60) percent owned by MII.

(b) As used throughout this Plea Agreement, the term "heavy-lift marine construction services" means the industry or service that installs, moves and removes offshore fixed oil and gas production platforms, decks and similar structures and provides related construction and transportation services. Defendant is, and from in or about 1993 until May 1997 ("the relevant time period") was, engaged in the sale and provision of heavy-lift marine construction services to customers in the United States, the North Sea and the Far East. Heavy-lift derrick barges are floating crane barges with a capacity to lift loads exceeding approximately 4,000 tons. Providers of heavy-lift derrick barge services or their related entities often also provide their customers with related marine construction services, such as engineering and platform removal services. During the relevant time period, there were from six to seven heavy-lift derrick barges in the world; defendant, at various times, controlled from four to five of these barges.

(c) During the relevant time period, the defendant, through several of its representatives and a third-party intermediary, participated in a conspiracy with other firms engaged in the sale and provision of heavy-lift marine construction services. The primary terms of the conspiracy were to allocate contracts among providers of heavy-lift marine construction services and to rig bids to customers for such services in the United States, the North Sea and the Far East. In furtherance of the conspiracy, the defendant, through several of its representatives and a third-party intermediary, engaged in telephone conversations and attended meetings with representatives of other firms engaged in the sale and provision of heavy-lift marine construction services. During such meetings and in such telephone conversations, the conspirators agreed on the prices the firms would bid to customers for heavy-lift marine construction services in the United States, the North Sea and the Far East, and which firms would submit bids for which prospective jobs in those areas. The purpose of the scheme was to increase the prices paid by customers of heavy-lift marine construction services in the United States, the North Sea and the Far East.

(d) During the relevant time period, the defendant and its co-conspirators sold and provided heavy-lift marine construction services to customers in the United States, the North Sea and the Far East. These services were in the flow of and substantially affected U.S. foreign and interstate commerce.

(e) During the relevant time period, acts in furtherance of this conspiracy were carried out within the United States.

POSSIBLE MAXIMUM SENTENCE

5. The defendant understands that the maximum penalty which may be imposed against it upon conviction for a violation of the Sherman Antitrust Act is a fine in an amount equal to the largest of: (a) $10 million (15 U.S.C. § 1); (b) twice the gross pecuniary gain derived from the crime; or (c) twice the gross pecuniary loss caused to the victims of the crime (18 U.S.C. § 3571), and a term of probation of at least one year but not more than five years (18 U.S.C § 3561 (c)

(1))). In addition, the defendant understands that the Court is required by 18 U.S.C. § 3013 (a) (2) (B) to order the defendant to pay a $400 special assessment upon conviction for the charged crime and that, under §8B1.1 (a) (2) of the United States Sentencing Commission Guidelines (hereafter U.S.S.G.), the Court may order it to pay restitution to the victims of the offense.

SENTENCING GUIDELINES

6. Sentencing for the offense to be charged will be conducted pursuant to the U.S.S.G. Manual in effect on the day of sentencing. Pursuant to U.S.S.G. §1B1.8, self-incriminating information provided to the United States pursuant to this Plea Agreement will not be used to increase the volume of affected commerce attributable to the defendant or in determining the applicable Guideline range.

SENTENCING AGREEMENT

7. Pursuant to Rule 11(e)(1)(C), Fed. R. Crim. P., the United States and the defendant agree that the appropriate disposition of the Information is a sentence requiring the defendant to pay a fine, pursuant to 18 U.S.C. § 3571, to the United States in the amount of $49 million within five business days of sentencing, with no term of probation. In connection with their determination of the appropriate criminal fine set forth in the sentencing agreement in this Paragraph, the United States and the defendant considered separately the issues presented with respect to commerce attributable to conduct in the Gulf of Mexico and commerce attributable to conduct in the North Sea and the Far East covered by this conspiracy, and then applied the appropriate Guidelines as follows:

Commerce Attributable to Conduct in the Gulf of Mexico

(i) Pursuant to U.S.S.G. §8C2.5., the defendant's culpability score is 6. This number is calculated by starting with 5 points, pursuant to U.S.S.G. §8C2.5(a); adding 3 points because the organization has 200 or more employees and an individual within high-level personnel of the organization participated in, condoned or was willfully ignorant of the offense, pursuant to U.S.S.G. §8C2.5(b)(3); and subtracting 2 points because the defendant fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, pursuant to U.S.S.G.§8C2.5(g)(2). Accordingly, the minimum multiplier to be applied to the base fine is 1.2 and the maximum multiplier is 2.4, pursuant to U.S.S.G. §8C2.6;

(ii) The base fine is 20% of the volume of commerce, pursuant to U.S.S.G. §2R1.1 (d)(1) and §8C2.4(a) and (b). The parties agree that the affected volume of commerce attributable to the defendant in the Gulf of Mexico is $165.8 million. The base fine for the Gulf of Mexico commerce is $33.16 million (20% of $165.8 million). Applying the multipliers of 1.2 and 2.4 to this amount, the fine range for Gulf of Mexico commerce is between $39.79 million and $79.59 million:

(iii) The parties agree that the appropriate fine for the commerce affected by the defendant's conduct in the Gulf of Mexico is $29 million. In agreeing that the fine calculation based upon the commerce affected by the defendant's conduct in the Gulf of Mexico should result in a fine below the Guidelines range for that portion of the commerce affected by the conspiracy, the United States took into account the early cooperation and substantial assistance provided by the defendant in this matter. Despite this substantial assistance, the United States will not move for a downward departure pursuant to U.S.S.G. §8C4.1, because the parties agree that: (1) the volume of commerce affected by the defendant's conduct in the North Sea and the Far East presents an aggravating factor that requires an upward adjustment to the $29 million fine amount (see paragraph 7(iv) below); and (2) the appropriate disposition of this case is a fine that takes into account both the commerce attributable to the defendant in the Gulf of Mexico and a portion of the commerce attributable to the defendant in the North Sea and the Far East, which results in a total fine which is within the Guidelines range of $39.79 million to $79.59 million (see paragraph 7(vi) below);

Commerce Attributable to Conduct in the North Sea and the Far East

(iv) The parties agree that the volume of commerce attributable to the defendant in the North Sea and Far East is in excess of $1 billion. With respect to such commerce, the defendant takes the position that the United States would not be able to show that the conduct related to such commerce violated United States antitrust laws or affected commerce under the Guidelines. While not accepting the defendant's position, the United States recognizes that establishing the portion of defendant's commerce in the North Sea and Far East that should appropriately be included in the Guidelines calculation would be difficult. With these considerations in mind, the parties agree that the defendant's conduct in the North Sea and Far East is an aggravating factor that requires an upward adjustment to the $29 million fine amount based on Gulf of Mexico commerce noted above (see paragraph 7(iii)), and that a figure that is twice the $10 million statutory maximum for a violation of 15 U.S.C. § 1, or $20 million, is an appropriate upward adjustment to account for that commerce. The United States will not move for an upward departure to the Guidelines range pursuant to U.S.S.G. §5K2.0, because adding the $20 million adjustment to the agreed-upon appropriate fine amount of $29 million for Gulf of Mexico commerce results in a fine of $49 million for the entire conspiracy (see paragraph 7(vi) below), which is within the Guidelines range of $39.79 million to $79.59 million;

(v) In agreeing that $49 million is the appropriate fine for the commerce described, the United States also took into account the fact that the defendant has agreed to a disposition of this case at a very early stage in the investigation, that it has already provided substantial cooperation and that this Plea Agreement requires it to provide continuing substantial cooperation;

Fine Amount

(vi) As described above (see paragraph (iv)), the addition of the $29 million and $20 million amounts for (a) Gulf of Mexico and (b) North Sea and Far East commerce, respectively, results in a total fine of $49 million for the commerce covered by the Information;

(vii) Since the United States has not concluded its investigation and is not in a position to calculate with certainty the amount of overcharges (gain) derived by the defendant and its corporate co-conspirators, for purposes of sentencing in this case, the government and the defendant agree that $49 million is the appropriate fine under 18 U.S.C. § 3571(d); and

(viii) The defendant understands that, pursuant to 18 U.S.C. § 3013(a)(2)(B) and U.S.S.G. § 8E1.1, the Court will order it to pay a $400 special assessment in addition to the agreed-upon fine.

8. The United States and the defendant believe that this Plea Agreement contains sufficient information concerning the defendant, the crime charged in this case and the defendant's role in the crime to enable the meaningful exercise of sentencing authority by the Court pursuant to 18 U.S.C. § 3553. The United States will not object to the defendant's request that the Court accept the defendant's guilty plea and immediately impose sentence notwithstanding the provisions of Rule 32(b)(1), Fed. R. Crim. P., U.S.S.G. §6A1.1 and Local Criminal Rule 2.06. The Court's denial of the request to impose sentence immediately based upon the record provided by the defendant and the United States will not void this Plea Agreement.

9. This Plea Agreement is not binding upon the Court. The United States and the defendant understand that the Court retains complete discretion to accept or reject the agreed-upon appropriate sentence provided for in Paragraph 7 of this Plea Agreement. If the Court does not impose the agreed-upon sentence, the Plea Agreement will be void and the defendant may withdraw its plea of guilty (Fed. R. Crim. P. 11 (e)(4)).

If the defendant withdraws its plea of guilty, the defendant's guilty plea, as well as any statements made in connection with or in furtherance of this plea or this Plea Agreement, or in the course of discussions leading to the plea or the Plea Agreement, will not be admissible against the defendant in any criminal or civil proceeding (Fed. R. Crim. P. 11(e)(6)).

DEFENDANT'S COOPERATION

10. The defendant, including its parents, subsidiaries, affiliates, predecessors and partnerships that are engaged in the business of providing heavy-lift marine construction services or have an ownership interest in a company engaged in such a business ("related entities") will fully and truthfully cooperate with the United States in the prosecution of this case, the conduct of the current federal investigation of violations of the federal antitrust and related criminal laws in the heavy-lift marine construction services industry, any other federal investigation resulting therefrom and any litigation or other proceedings arising or resulting from any such investigation to which the United States is a party ("Federal Proceeding"). Such cooperation will consist of the following:

(a) the production to the United States of all documents (except documents qualified as privileged under the laws of the United States), information and other materials, wherever located; in the possession, custody or control of the defendant or any of its related entities, requested by the United States in connection with any Federal Proceeding;

(b) making available in the United States and at other mutually agreed locations at defendant's expense. Drees Brunt, Edwin Goldman, Pieter Heerema, Jan Meek, Jan Hein Mulder and Hein Verloop, for interviews and the provision of testimony in grand jury, trial and other judicial proceedings in connection with any Federal Proceeding; and

(c) using its best efforts to secure the ongoing, full and truthful cooperation, as defined in Paragraph 11 of this Plea Agreement, of the current and former directors, officers or employees of the defendant or any of its related entities (excluding those specified in subparagraph (b) above) as may be requested by the United States, including making such persons available in the United States and at other mutually agreed locations, at defendant's expense, for interviews and the provision of testimony in grand jury, trial and other judicial proceedings in connection with any Federal Proceeding.

11. The full, complete and truthful cooperation of each person falling within the description of either Paragraph 10(b) or 10(c) above will be subject to the procedures and protections of Paragraph 12 below, and will include, but not be limited to: (i) producing in the United States and at other mutually agreed locations all non-privileged documents (including claimed personal documents) requested by attorneys and agents of the United States; (ii) making himself or herself available in the United States, and at other mutually agreed locations, for interviews by attorneys and agents of the United States on request; (iii) responding fully and truthfully to all inquiries of the United States in connection with any Federal Proceeding, without falsely implicating any person or intentionally withholding any information; (iv) otherwise giving the United States access to knowledge or information he or she may have related to any such Federal Proceeding; and (v) when called upon to do so by the United States, testifying in trial and grand jury or other proceedings in the United States, fully, truthfully and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623) and contempt (18 U.S.C. §§ 401-402), in connection with any such Federal Proceeding.

GOVERNMENT'S AGREEMENT

12. The United States agrees:

(a) not to bring criminal charges against any current or former director, officer or employee of the defendant or any of its related entities (other than Jan

Meek, with whom the United States has entered into a separate plea agreement, and any person who, while serving as a director, officer or employee of the defendant or any of its related entities, was also a director, officer or employee of MII or JRM) for any act or offense committed prior to the date of this Plea Agreement, and while such person was employed by the defendant or any of its related entities, that was undertaken in futherance of, or in connection with, any attempted or completed antitrust conspiracy, combination or scheme involving the sale or provision of heavy-lift marine construction services; provided, however, that such non-prosecution commitments with respect to Drees Brunt, Edwin Goldman, Pieter Heerema, Jan Hein Mulder and Hein Verloop are conditioned upon the provision by each, within sixty (60) days of the entry into and filing of this Plea Agreement (unless such period is extended in writing by the United States) of full, complete and truthful information regarding their participation and the participation of others in the conspiracy and upon such person fully complying with his or her obligations under Paragraph 11 of this Plea Agreement;

(b) should the United States determine that any individual falling within the description of Paragraph 10(b) or 10(c) of the Plea Agreement may have information relevant to any Federal Proceeding, the United States may request such person's cooperation pursuant to the terms of this Plea Agreement by written request delivered to counsel for the individual (with a copy to the undersigned counsel for the defendant) or, if the individual is not known by the United States to be represented, the undersigned counsel for the defendant;

(c) in the event that any person requested to provide cooperation pursuant to Paragraph 12(b) fails to comply with such person's obligations under Paragraph 11 of this Plea Agreement, any agreement not to prosecute such person granted in this Plea Agreement shall be void;

(d) except as provided in Paragraph 12(e) below, information relating to any attempted or completed antitrust conspiracy, combination or scheme involving the sale or provision of heavy-lift marine construction services by the defendant provided to the United States by any person pursuant to the terms of Paragraph 12(a) or 12(b) of this Plea Agreement, or any information directly or indirectly derived from such information, shall not be used against such person or the defendant or any of its related entities in any criminal case, except a prosecution for perjury (18 U.S.C. § 1621), making a false statement or declaration in grand jury or court proceedings (18 U.S.C. § 1623) or obstruction of justice (18 U.S.C. § 1503);

(e) in the event a person who provides information to the United States pursuant to this Plea Agreement fails to comply with his or her obligations under Paragraph 11 of this Plea Agreement, the agreement in Paragraph 12(d) not to use such information, or any information directly or indirectly derived from such information, against such person in a criminal case shall be void; and

(f) the non-prosecution terms of this Paragraph do not apply to civil liability of any kind to the United States, to any violations of the federal tax laws, to any crime of violence or to violations of the Foreign Corrupt Practices Act.

13. Upon the tender of the guilty plea called for by this Plea Agreement, imposition of the agreed-upon sentence described in Paragraph 7 of this Plea Agreement, payment by the defendant of the fine imposed by the Court at sentencing, entry of the plea called for by the separate plea agreement with Jan Meek (Exhibit A, attached) and subject to the cooperation requirements of Paragraph 10 of this Plea Agreement, the United States agrees that it will not bring further criminal charges against the defendant or any of its related entities for any act or offense committed prior to the date of this Plea Agreement which was undertaken in furtherance of, or in connection with, any attempted or completed antitrust conspiracy, combination or scheme

involving the sale or provision of heavy-lift marine construction services. The non-prosecution term of this Paragraph with respect to any current or former director, officer or employee of the defendant and of any of its related entities is contingent upon such individual's provision of full, complete and truthful cooperation consistent with the terms of Paragraph 11 in connection with any investigation by the United States of any attempted or completed antitrust conspiracy, combination or scheme involving the sale or provision of heavy-lift marine construction services. The non-prosecution terms of this Paragraph do not pertain to any attempted or completed antitrust conspiracy, combination of scheme involving the sale or provision of heavy-lift transport services (covered by separate plea agreements between the United States and Dockwise N.V., Dockwise U.S.A. Inc., Christiaan Bernardus van der Zwan and Bastian Albertus de Jong); nor do they apply to civil liability of any kind to the United States, to any violations of the federal tax laws, to any crime of violence or to violations of the Foreign Corrupt Practices Act.

14. Upon the tender of the guilty plea called for by this Plea Agreement, imposition of the agreed-upon sentence described in Paragraph 7 of this Plea Agreement, payment by the defendant of the fine imposed by the Court at sentencing, entry of the plea called for by the separate plea agreement with Jan Meek (Exhibit A, attached) and subject to the cooperation requirements of Paragraph 10 of this Plea Agreement, the United States agrees not to bring further criminal charges against the defendant, any of its related entities or any current or former director, officer or employee of the defendant or any of its related entities (other than those persons excepted from Paragraph 12(a)), for any act or offense committed prior to the date of this Plea Agreement that was undertaken in futherance of, or in connection with, any attempted or completed antitrust conspiracy, combination or scheme involving the sale or provision of any good or service produced or sold by the defendant or any of its related entities. The non-prosecution term of this Paragraph with respect to the defendant and its related entities is further contingent upon:

(a) disclosure by the defendant to the United States within sixty (60) days of the execution of this Plea Agreement of all potential violations of federal antitrust laws known to Peter Beijnes, Willem van Benten, Drees Brunt, Ed Damen, Rob Erbrink, Bruce Gresham, Edwin Goldman, Pieter Heerema, Jan Meek, Jan Hein Mulder, John Reed, Frans van de Werff, Peter van Eck, Hein Verloop, Guy Waldvogel and Piet Wirds and (b) the provision of full, complete and truthful cooperation by the defendant and its related entities to the United States consistent with the terms of Paragraph 10 in connection with any investigation by the United States related to a good or service produced or sold by the defendant or by any related entity. The non-prosecution term of this Paragraph with respect to any current or former director, officer or employee of the defendant and of any of its related entitites is contingent upon such individual's provision of full, complete and truthful cooperation consistent with the terms of Paragraph 11 in connection with any investigation by the United States related to a good or service produced or sold by the defendant or by any related entity. The non-prosecution terms of this Paragraph do not pertain to any attempted or completed antitrust conspiracy, combination or scheme involving the sale or provision of (a) heavy-lift marine construction services (covered by Paragraph 13) or (b) heavy-lift transport services (covered by separate plea agreements between the United States and Dockwise N.V., Dockwise U.S.A. Inc., Christian Bernardus van der Zwan and Bastiaan de Jong); nor do they apply to civil liability of any kind to the United States, to any violations of the federal tax laws, to any crime of violence or to violations of the Foreign Corrupt Practices Act.

15. The United States agrees that when any person travels to the United States for interviews, court appearances or grand jury appearances pursuant to this Plea Agreement, the United States will take no action, based either upon any offense subject to this Plea Agreement or related to any actual or alleged violation of this Plea Agreement, to subject such person to arrest, service of process or prevention from departing the United States. This Paragraph does not apply to

an individual's commission of perjury (18 U.S.C. § 1621), making a false statement or declaration in grand jury or court proceedings (18 U.S.C. § 1623), obstruction of justice (18 U.S.C. § 1503) or contempt (18 U.S.C. §§ 401-402) in connection with any testimony provided in trial, grand jury or other judicial proceedings in the United States.

16. The defendant understands that it may be subject to administrative action by federal or state agencies other than the United States Department of Justice, Antitrust Division, as a result of the guilty plea entered pursuant hereto, and that this Plea Agreement in no way controls what action, if any, such other agencies may take. The United States agrees, however, that, if requested, it will advise appropriate officials of any government agency considering administrative action against the defendant as a result of the guilty plea entered hereto, of the fact, manner, extent and value of the cooperation of defendant as a matter for such agency to consider before determining what administrative action, if any, to take with regard to the defendant.

REPRESENTATION OF COUNSEL

17. The defendant has been represented by counsel and is fully satisfied with its attorneys' legal representation. The defendant has thoroughly reviewed this Plea Agreement and has voluntarily and knowingly entered into this Plea Agreement.

VOLUNTARY PLEA

18. The plea of guilty required by Paragraph 2 of this Plea Agreement is acknowledged to be free and voluntarily, and not the result of force or threats or of promises or representations, except for the promises or representations set forth in this Plea Agreement. There have been no promises or representations to the defendant as to whether the Court will accept or reject this Plea Agreement.

VIOLATION OF PLEA AGREEMENT

19. The defendant agrees that should the United States determine in good faith, during the period of time that any Federal Proceeding is pending, that the defendant or any of its related entities has materially failed to provide cooperation (as described in Paragraph 10 of this Plea Agreement) or otherwise has materially violated any other provision of this Plea Agreement, the United States will notify the defendant in writing, delivered to counsel for the defendant by overnight delivery or by facsimile transmission, of its intention to void any of its obligations under this Plea Agreement (except its obligations under this Paragraph). The defendant may seek court review of any determination made by the United States under this Paragraph.

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 6a. Conduct involving trade or commerce with foreign nations

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--

(1) such conduct has a direct, substantial, and reasonably foreseeable effect--

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

②

Supreme Court, U.S.
FILED

JUL 12 2001

OFFICE OF THE CLERK

No. 00-1842

In The

Supreme Court of the United States

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STATOIL ASA,

Petitioner,

v.

HEEREMAC V.O.F., ET AL.,

Respondents.

◆

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

◆

THE SAIPEM RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

◆

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July 12, 2001

80 pp

QUESTIONS PRESENTED

1. Does the Sherman Act, which governs U.S. "commerce . . . with foreign nations," apply to a Norwegian company's claim that its Norwegian operations were damaged by alleged overcharges by English and Dutch defendants on projects that occurred exclusively in the North Sea?

2. Can a foreign plaintiff whose only alleged injuries were incurred in a foreign country from the foreign effects of an alleged agreement among foreign defendants in connection with foreign transactions establish U.S. antitrust jurisdiction, and avoid the operation of the Foreign Trade Antitrust Improvements Act, merely by alleging that the foreign defendants' conduct also had an effect on some other person in U.S. domestic commerce?

3. When a foreign plaintiff's alleged injury arises out of the effect that foreign defendants' conduct has on foreign, rather than U.S. domestic commerce, does the foreign plaintiff have standing to assert claims under the U.S. antitrust laws?

PARTIES TO THE PROCEEDING

Petitioner Statoil ASA was previously known as Den norske stats oljeselskap a.s.

Respondents are HeereMac v.o.f.; Heerema Marine Contractors; Heerema Offshore Services U.S., Inc.; Heerema Offshore Construction Group, Inc.; Jan Meek, Pieter Heerema; McDermott International, Inc.; McDermott Incorporated; J. Ray McDermott, Inc.; J. Ray McDermott, S.A.; J. Ray McDermott Gulf Contractors, Inc.; McDermott Engineers & Constructors (USA), Inc.; McDermott Engineering Houston, L.L.C.; McDermott-ETPM, Inc.; Saipem S.p.A.; Saipem International B.V.; Saipem UK Limited; Saipem (Portugal)-Comercio Maritimo, Sociedade Unipessoal, S.A.

CORPORATE DISCLOSURE STATEMENT

Respondent Saipem (Portugal)-Comercio Maritimo, Sociedade Unipessoal, S.A. is wholly owned by Saipem (Portugal) Gestão e Participiçoes SGPS S.A., which is wholly owned, along with Respondent Saipem UK Limited, by Respondent Saipem International B.V. Respondent Saipem International B.V. is wholly owned by Respondent Saipem S.p.A. Respondent Saipem S.p.A. is partially owned (approximately 40 percent) by Eni, S.p.A.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

RELEVANT STATUTORY PROVISIONS............. 1

STATEMENT OF THE CASE 1

I. Factual Background and Allegations......... 1

II. Proceedings in the Lower Courts............ 2

A. The District Court Dismissed Statoil's Claims, But Retained Jurisdiction Over Claims Based on Injuries that Arose from Anticompetitive Effects on U.S. Commerce 2

B. The Fifth Circuit Affirmed the Dismissal of Statoil's Claims 3

REASONS FOR DENYING THE WRIT 5

I. The Fifth Circuit's Decision Presents No Conflict 7

A. Every Court that Has Considered the Meaning of § 6a(2) Has Agreed with the Fifth Circuit's Analysis 7

B. The Cases on Which Statoil Relies Are Entirely Consistent with the Fifth Circuit's Decision 10

TABLE OF CONTENTS - Continued

Page

II. The Fifth Circuit Correctly Held that There Is No Jurisdiction in this Case.................. 14

  A. The Sherman Act Does Not Apply to Commerce Within or Between Foreign Nations 14

  B. The FTAIA Precludes Jurisdiction Over Statoil's Claims 15

    1. The Plain Language of the FTAIA Precludes Jurisdiction 16

    2. The Legislative History of the FTAIA Confirms that There Is No Jurisdiction................................ 20

    3. Policy Considerations Support the Fifth Circuit's Decision.............. 25

III. The Fifth Circuit's Judgment Can Be Supported on the Independent Ground that Statoil Lacks Standing 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Associated General Contractors of Calif., Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) 28

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 333 (1990) 28, 29

de Atucha v. Commodity Exchange, Inc., 608 F. Supp. 510 (S.D.N.Y. 1985) 29

In re Auction Houses Antitrust Litigation, 138 F. Supp. 2d 548 (S.D.N.Y. 2001) 7

Caribbean Broadcast System v. Cable & Wireless, 148 F.3d 1080 (D.C. Cir. 1998) 11, 12

Central Bank v. First Interstate Bank, 511 U.S. 164 (1994) 25

EEOC v. Aramco, 499 U.S. 244 (1991) 15

Empagran, S.A. v. F. Hoffman-La Roche, Ltd., No. 00-1686 (TFH), 2001 WL 761360 (D.D.C. June 7, 2001) 7, 9

Eurim-Pharm GmbH v. Pfizer, Inc., 593 F. Supp. 1102 (S.D.N.Y. 1984) 13

Ferromin Int'l Trade Corp. v. UCAR Int'l, No. 99-693 (E.D. Pa. June 13, 2001) 8, 9, 10

Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993) 11

Kruman v. Christie's International plc, 129 F. Supp. 2d 620 (S.D.N.Y. 2001) 7, 8, 24

Liamuiga Tours v. Travel Impressions, Ltd., 617 F. Supp. 920 (E.D.N.Y. 1985) 13

TABLE OF AUTHORITIES – Continued

Page

McElderry v. Cathay Pacific Airways, 678 F. Supp. 1071 (S.D.N.Y. 1988) 13

McGlinchy v. Shell Chemical Co., 845 F.2d 802 (9th Cir. 1988) 13

Metallgesellschaft AG v. Sumitomo Corp. (In re Copper Antitrust Litigation), 117 F. Supp. 2d 875 (W.D. Wis. 2000) 7, 9, 16, 19

In re Microsoft Corp., 127 F. Supp. 2d 702 (D. Md. 2001) 7, 8, 24, 29

Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978) 10, 11, 22, 23, 27

Schlesinger v. Herzog, 2 F.3d 135 (5th Cir. 1993) 18

Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) 15

U.S. v. Gonzales, 520 U.S. 1 (1997) 20

U.S. v. Maldonado-Rivera, 922 F.2d 934 (2d Cir. 1990) 18

U.S. v. Nippon Paper Industrial Co., 109 F.3d 1 (1st Cir. 1997) 12

STATUTES AND RULES

15 U.S.C. § 1 .... 1, 3, 11, 14

15 U.S.C. § 2 .... 1, 3, 14

15 U.S.C. § 6a .... *passim*

Fed. R. Civ. P. 12(b)(6) 18

5th Cir. R. 35 (I.O.P.) 4

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

H.R. REP. NO. 97-686, FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1982, *reprinted in* 1982 U.S.C.C.A.N. 2487 .... 20-25, 27

DELUXE BLACK'S LAW DICTIONARY (6th ed. 1990) 17

THE OXFORD ENGLISH DICTIONARY OF ENGLISH GRAMMAR (1994) 17

IA Phillip Areeda & Herbert Hovenkamp, ANTITRUST LAW (1997) 14, 28

U.S. Dep't of Justice, Antitrust Div., International Competition Pol'y Advisory Comm., *Final Report to the Attorney General and Assistant Attorney General for Antitrust* 247 (Feb. 2000) 27

U.S. Dep't of Justice & Federal Trade Comm'n, *Antitrust Enforcement Guidelines for International Operations* § 3.12 (1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,107 27

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RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are the Sherman Act, 15 U.S.C. §§ 1, 2, and the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a. These statutes are set forth in full in the Appendix to this brief. *See* App. 39a.

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STATEMENT OF THE CASE

I. Factual Background and Allegations

A foreign plaintiff alleges that its foreign operations have been damaged by the foreign effects of an alleged agreement among foreign defendants. Statoil is a Norwegian corporation with its principal place of business in Norway. 16 R. 417. The Saipem Defendants are also foreign citizens. 16 R. 411-08. Statoil's claims concern alleged damages that were "incurred in the Norwegian sector of the North Sea." *Id.* Specifically, Statoil contends that Saipem[1] or another foreign firm overcharged Statoil for the provision of heavy-lift services in connection with the construction of oil and gas platforms in the North Sea. Although Statoil makes conclusory allegations that Saipem participated in a worldwide conspiracy that had an effect on U.S. commerce, Statoil does not allege that its injury arose from these effects on U.S. commerce. Pet. 5. Nor could it: Statoil does not allege that it owns any platforms in U.S. waters, and it does not allege that it purchased any of the relevant goods or services in U.S. commerce.

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[1] "Saipem" refers to all Saipem entities named as defendants in this action.

Statoil incorrectly suggests that HeereMac's agreement to plead guilty to violating the Sherman Act in 1999 is somehow relevant to its claim of U.S. antitrust jurisdiction over Saipem in this case. Saipem is not named in the HeereMac information or the plea. Furthermore, HeereMac's plea relates only to the effects of *its* conduct on U.S. commerce, and HeereMac disputes in the plea that its conduct affecting foreign commerce is subject to U.S. law. Pet. App. at 61a-62a. In any event, Statoil has not alleged, and cannot allege, that it has been harmed in the U.S. domestic market place.

II. Proceedings in the Lower Courts

A. The District Court Dismissed Statoil's Claims, But Retained Jurisdiction Over Claims Based on Injuries that Arose from Anticompetitive Effects on U.S. Commerce

After HeereMac pleaded guilty, companies from around the world converged on the federal courts in Houston to seek redress under the U.S. antitrust laws. They named as defendants the world's providers of heavy-lift services, including Saipem.

The first cases were filed by Phillips Petroleum Company and three of its foreign-based subsidiaries. 1 R. 2096. The *Phillips* plaintiffs alleged injury to several projects, only one of which was in U.S. waters in the Gulf of Mexico. 1 R. 2075-2073. The other projects were located in the North Sea and the Far East, and the purchasers of heavy-lift services on those projects were Phillips' foreign-based subsidiaries. 1 R. 2073-2070. The district court dismissed the claims of the foreign subsidiaries regarding projects in foreign waters, because those injuries did not arise from an effect on U.S. commerce. 7 R. 4143 *et seq.* The district court did not dismiss the claims related to the Phillips platform in U.S. waters. 7 R. 3966. Pet. App. 49a-50a. The district court also concluded (contrary to Statoil's suggestion, Pet. 6) that Saipem's actions did not have a direct, substantial, and reasonably foreseeable effect on U.S. commerce. Pet. App. 51a.

Statoil filed its action in Houston shortly before the foreign claims were dismissed in the *Phillips* case. Based on its reasoning in the *Phillips* case, the district court dismissed Statoil's claims because of a lack of subject matter jurisdiction and because Statoil lacked standing under U.S. antitrust laws. Pet. App. 50a-52a.

B. The Fifth Circuit Affirmed the Dismissal of Statoil's Claims

The Fifth Circuit affirmed on three grounds. First, the court held that Statoil's claims are not cognizable under the Sherman Act itself, as they do not involve " 'trade or commerce . . . *with* foreign nations.' " App. 12a (quoting 15 U.S.C. §§ 1, 2).[2] "The commerce that gives rise to the action here – the contracting for heavy lift barge services in the North Sea – was not United States commerce *with* foreign nations, but commerce *between* or *among* foreign nations – that is, between or among Statoil (a Norwegian corporation), Saipem (England), and HeereMac (The Netherlands)." *Id.* (emphasis in original). The

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[2] The Fifth Circuit's opinion is included in the Appendix to this Opposition, using the same page numbers as those in Statoil's Appendix.

Sherman Act, by its terms, simply does not apply to this wholly foreign commerce.

Second, the Fifth Circuit held that the plain language of § 6a(2) of the FTAIA requires Statoil to allege that its claim arose from the effect of the alleged conduct on U.S. commerce. App. 14a, 16a. Because Statoil's alleged injury does not "stem from the effect of higher prices for heavy-lift services in the Gulf [of Mexico]," the court held that Statoil cannot meet the FTAIA's requirements for antitrust jurisdiction. App. 14a.

Third, the Fifth Circuit held that Statoil lacks standing. App. 22a n.32.

Judge Higginbotham dissented, arguing that § 6a(2) "removes jurisdiction over conspiracies whose effects on United States commerce are beneficial or benign . . . . " App. 25a. The Fifth Circuit denied *en banc* review, with no judge requesting a poll.[3] Pet. App. 54a.

To bolster its claim that this case presents a conflict – in "rationale" – among the circuits, Statoil suggests that the Fifth Circuit believed that federal courts disagree as to the appropriate test for the extraterritorial reach of the Sherman Act. Pet. 6. But the Fifth Circuit made clear that the issue was one of first impression in the courts of appeals, and that the district courts addressing it had all reached the same conclusion as the Fifth Circuit: namely, that the FTAIA bars jurisdiction over a foreign party's claims that arise out of foreign effects of a defendant's alleged conduct. *See* App. 9a n.13, 18a.

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[3] Judge Higginbotham's suggestion that rehearing *en banc* would have been granted but for the recusal of three judges rings hollow because (1) there were still a sufficient number of judges eligible to vote to grant *en banc* review, and (2) not a single judge called for a poll, though all active judges plainly had the right to do so. 5th Cir. R. 35 (I.O.P.). *See* Pet. App. 55a.

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REASONS FOR DENYING THE WRIT

This case presents the question whether U.S. antitrust jurisdiction reaches the claims of a foreign plaintiff whose injuries arise from the effects on foreign commerce of the defendants' alleged conduct. The Fifth Circuit answered this question in the negative on three separate and independent grounds: (1) Statoil's claims are not cognizable under the Sherman Act, (2) Statoil's claims are barred under the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), and (3) Statoil cannot establish antitrust standing. Statoil focuses almost exclusively on the second issue, but to no avail: nothing in the Fifth Circuit's interpretation of the FTAIA warrants the grant of the Petition.

The Fifth Circuit is the only court of appeals to interpret the relevant provision of the FTAIA, 15 U.S.C. § 6a(2). It concluded that the FTAIA, its legislative history, and policy considerations compel the conclusion that plaintiffs may not recover under the U.S. antitrust laws for injuries arising in foreign commerce. The growing number of district courts that have addressed the issue have reached the same conclusion.

Unable to prevail on the question actually presented by this case, Statoil simply changes the question. Rather than arguing, as the FTAIA requires, that its injury arises from the anticompetitive ***effect*** on U.S. commerce of the defendants' conduct, Statoil argues that its claim "arises directly out of the anticompetitive ***conduct.***" Pet. i (emphasis added). Statoil also focuses its argument on authorities that stand for the unremarkable proposition that antitrust plaintiffs must allege that the defendants' conduct has an anticompetitive effect on U.S. commerce. Statoil, however, cites no authority for the proposition that a plaintiff's own injury need not arise from those anticompetitive effects on U.S. commerce.

Statoil's inability to find supporting authority stems from the fact that the courts understand what Statoil does not: Congress intended the FTAIA to limit the application of the antitrust laws to injuries arising from anticompetitive effects ***on U.S. commerce***. In doing so, Congress expressly desired to respect the sovereignty of other nations to govern their own markets and to encourage those nations to adopt their own competition laws. Statoil's alarmist suggestion that, absent the benign hegemony of the U.S. antitrust laws, international cartels will rule the world ignores the widespread adoption of competition laws around the globe, as well as the substantial deterrent effects that remain under the Fifth Circuit's decision. Nothing in the FTAIA, its legislative history, or relevant policy considerations requires the United States to be the world's forum for the resolution of all competition-related grievances.

For these and other reasons, the petition for writ of certiorari should be denied. First, the Fifth Circuit's decision presents no conflict among circuits. Second, it does not present a question of national importance to the U.S. economy that the Court should address at this time.

Finally, and most importantly, the decision below is correct.

I. The Fifth Circuit's Decision Presents No Conflict

Statoil attempts to manufacture a conflict in this case by arguing that the Fifth Circuit's "***rationale*** is inconsistent with that of relevant Supreme Court and appellate court precedents." Pet. 10 (emphasis added). Statoil must resort to arguments about "rationales" because every case that has considered the statutory provision at issue has agreed with the Fifth Circuit. In any event, the decisions of other courts are entirely consistent with the Fifth Circuit's decision.

A. Every Court that Has Considered the Meaning of § 6a(2) Has Agreed with the Fifth Circuit's Analysis

As the Fifth Circuit recognized, this case presented an issue of first impression in the courts of appeals with respect to the interpretation of § 6a(2)'s requirement that the forbidden effects on U.S. commerce must "give rise to a claim." *See* Pet. App. 9a n.13, 18-19a. But the district courts that have considered the issue have agreed, in a "unanimous line of authority," with the Fifth Circuit's interpretation of the FTAIA. *In re Auction Houses Antitrust Litig.*, 138 F. Supp. 2d 548, 551 (S.D.N.Y. 2001). *See Kruman v. Christie's Int'l plc*, 129 F. Supp. 2d 620 (S.D.N.Y. 2001); *In re Microsoft Corp.*, 127 F. Supp. 2d 702 (D. Md. 2001); *Metallgesellschaft AG v. Sumitomo Corp. (In re Copper Antitrust Litig.)*, 117 F. Supp. 2d 875 (W.D. Wis. 2000); *Empagran, S.A. v. F. Hoffman-La Roche, Ltd.*, No. 00-1686

(TFH), 2001 WL 761360 (D.D.C. June 7, 2001); *Ferromin Int'l Trade Corp. v. UCAR Int'l*, No. 99-693 (E.D. Pa. June 13, 2001). Neither the Dissent nor Statoil attempts to distinguish these cases.

For example, in *Christie's*, the plaintiffs alleged a conspiracy to fix prices for auction services in the United States and abroad. 129 F. Supp. 2d at 622. *Christie's* raised the same question as does this case:

> The fundamental question here is whether a transnational price fixing conspiracy that affects commerce both in the United States and in other countries inevitably gives persons injured abroad in transactions otherwise unconnected with the United States a remedy under our antitrust laws. Unless the Court is to impute to Congress an intention to establish an antitrust regime to cover the world, the answer must be "no."

Id. at 623-24. The court therefore dismissed the claims of the plaintiffs who purchased the defendants' auction services abroad. *Id.* at 626.

Likewise, *In re Microsoft* rejected claims made by purchasers in foreign commerce, even though Microsoft's alleged conduct had substantial effects on U.S. commerce. Like Statoil, the foreign *Microsoft* plaintiffs alleged that they were injured by the same conduct that affected U.S. commerce, and that their injuries were necessary to achieve the anticompetitive effects felt in the United States. *See* 127 F. Supp. 2d at 716. The court, however, held "that a plaintiff who has not participated in the U.S. domestic market may not bring a Sherman Act claim under the FTAIA." *Id.*

The court in *Sumitomo* reached a similar conclusion. The *Sumitomo* plaintiffs alleged that the defendants conspired to restrain trade on the London Metals Exchange, where 95% of the world's copper futures are traded, and which serves as the primary exchange for merchants and traders in the United States. *See* 117 F. Supp. 2d at 878. The plaintiffs contended that by artificially driving up the price of copper futures on the LME, the defendants caused copper prices in the United States to be artificially inflated. *Id.* at 879-80. The plaintiffs, however, were foreign entities that were injured by adverse effects on the LME. *Id.* at 877, 880, 887. The *Sumitomo* court dismissed the plaintiffs' claims, holding that "[t]he logical interpretation of the language of § 6a is that Congress extends domestic jurisdiction to extraterritorial conduct only when the plaintiffs have been injured by the effects on the domestic market." *Id.* at 887.

The court in *Empagran* granted defendants' motion to dismiss antitrust claims brought by purchasers of vitamins in foreign commerce. *See* 2001 WL 761360, at *1. Like Statoil, the *Empagran* plaintiffs alleged a global conspiracy to fix the price of their product in the United States and abroad. *See id.* at *1, 2. The court held that the plaintiffs were required, but failed, to allege that "the injuries they seek to remedy 'arise' from an anticompetitive effect of defendants' conduct on U.S. commerce." *Id.* at *2.

Most recently, *Ferromin* dismissed claims brought by purchasers in foreign commerce who alleged price fixing and market allocation in the "worldwide market for graphite electrodes." Slip op. at 2-3. The court reviewed the applicable caselaw and concluded that "[t]he one federal appeals court and many district courts" addressing § 6a(2) all concluded that plaintiffs asserting a claim under U.S. antitrust laws must "show ***both*** that the complained-of conduct had a direct, substantial and reasonably foreseeable effect on the United States domestic marketplace, ***and that an anticompetitive effect on the United States marketplace*** must give rise to plaintiff's claimed injuries." *Id.* at 6 (emphasis in original). Neither Statoil nor the Dissent address this "unanimous line of authority" supporting the Fifth Circuit's decision.

B. The Cases on Which Statoil Relies Are Entirely Consistent with the Fifth Circuit's Decision

In an effort to buoy its novel interpretation of the FTAIA, Statoil points to several cases that it contends conflict with the Fifth Circuit's "rationale" or "approach" in this case. Most of those cases involve plaintiffs who sustained their injury in U.S. commerce, and thus are entirely consistent with the Fifth Circuit's decision.

For example, as the Dissent in this case conceded, the plaintiff in *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978), made its purchases in the United States. Pet. App. 29a. *See Pfizer*, 434 U.S. at 318 ("When a foreign nation enters ***our commercial markets*** as a purchaser of goods or services, it can be victimized by anticompetitive practices just as surely as a private person or domestic state.") (emphasis added). In any event, antitrust jurisdiction was not raised in *Pfizer*, which considered only whether foreign nations are "persons" under the Clayton Act: "We hold today ***only*** that a foreign nation ***otherwise entitled to sue in our courts*** is entitled to sue for treble damages under the antitrust laws ***to the same extent as any other plaintiff.***" *Id.* at 320 (emphasis added).

Likewise, the plaintiffs in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), were nineteen U.S. states and certain private plaintiffs who asserted injury arising from the ***domestic*** effects of a conspiracy directed at the ***domestic marketplace***: they alleged that the defendants "conspired in violation of § 1 of the Sherman Act to restrict the terms of commercial general liability (CGL) insurance ***available in the United States.***" *Id.* at 770 (emphasis added).

The plaintiffs in *Caribbean Broadcast System v. Cable & Wireless*, 148 F.3d 1080 (D.C. Cir. 1998), also alleged an injury arising out of harm to domestic commerce. In *Caribbean*, the plaintiff was a radio broadcaster that was physically located in the British Virgin Islands, but which broadcast to the Eastern Caribbean, including the U.S. Virgin Islands and Puerto Rico. *Id.* at 1082. Although the plaintiff was foreign, it nevertheless alleged an injury arising from domestic effects – namely, that defendants, which operated a competing radio station, had monopolized and therefore prevented the plaintiff from participating in the U.S. market for radio advertising. *See* 148 F.3d at 1087 (stating that plaintiff "alleges that [plaintiff] was and remains foreclosed from selling advertising to many of those U.S. companies that had purchased advertising time from [defendant]" at supracompetitive prices); *id.* at 1086 (observing jurisdiction proper because "the alleged injury is to advertisers ***in the United States***"). Nothing in the opinion supports Statoil's assertion that *Caribbean* permitted the plaintiff to pursue ***all*** of its claims for damages, whether based on foreign or domestic effects. *See* Pet. 25. In any event, the parties in *Caribbean* did not raise, and the court did not consider, whether the FTAIA requires proof that the plaintiff's injury arose from the anticompetitive effect on U.S. commerce.[4]

Statoil's reliance on *U.S. v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997), is similarly misplaced. The indictment in *Nippon* alleged that the defendant and others agreed "to fix the price of thermal fax paper ***throughout North America***" and that the defendant "sold thermal fax paper worth approximately $6,100,000 for ***import into the United States.***" *Id.* at 2 (emphasis added). *Nippon* thus involved targeted sales by the conspirators into the United States with injuries flowing from the effects of that conspiracy within the United States. In any event, *Nippon* expressly disclaimed reliance on the FTAIA and made no pretense of interpreting it. *See id.* at 4.

Statoil also cites dicta from numerous cases to support the argument that those cases "point in a direction quite different" from the Fifth Circuit's decision merely because they state that a plaintiff must allege that the U.S. market has suffered an anticompetitive effect. Pet. 27-28. However, in each of those cases, the court's refusal to assert jurisdiction was proper because the plaintiffs' claims did not arise from any forbidden effects on U.S. commerce.[5] Statoil's reliance on those cases is therefore puzzling,[6] and they further demonstrate the unanimity with which courts have concluded that the FTAIA does not permit jurisdiction over claims arising out of foreign effects.

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[4] The *Caribbean* court observed that the plaintiff raised only two issues: (1) whether the case was an export case governed by § 6a(1)(B), *see id.* at 1086, or (2) whether "the complaint failed to allege either harm to U.S. commerce or a relevant market," *id.* at 1085, 1086-87. With respect to the latter, the defendants were making the argument – common to antitrust suits brought by competitors – that harm to a competitor is not necessarily harm to competition. The court rejected the defendants' argument, holding that "injury to [the plaintiff] is ultimately a harm to U.S. purchasers of radio advertising," because "[b]y keeping [the plaintiff] out of the market, [the defendants] denied such purchasers the benefit of competition." 148 F.3d at 1087.

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[5] *See McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 815 (9th Cir. 1988) (holding no jurisdiction where plaintiffs alleged they sold pipe in the U.S. and overseas, but their alleged injury arose from termination of an agreement to be defendant's "exclusive representative in the sale, promotion and distribution of PB resin and products ***in South East Asia and other areas***" and where plaintiffs alleged only injury to themselves, rather to competition in the relevant market); *Eurim-Pharm GmbH v. Pfizer, Inc.*, 593 F. Supp. 1102, 1103-04, 1106 (S.D.N.Y. 1984) (dismissing claims of German wholesaler, distributer, importer and exporter of pharmaceuticals that alleged price fixing in world market for Vibramycin artificially inflated the price in the United States); *Liamuiga Tours v. Travel Impressions, Ltd.*, 617 F. Supp. 920, 924 (E.D.N.Y. 1985) ("The consequences suffered ***by plaintiff*** are limited to St. Kitts. Accordingly, these effects do not establish a jurisdictional nexus.") (emphasis added); *McElderry v. Cathay Pacific Airways*, 678 F. Supp. 1071 (S.D.N.Y. 1988) (finding lack of subject matter jurisdiction where American citizen alleged illegal overcharges in foreign commerce).

[6] Even if Statoil could prove an anticompetitive effect on a U.S. market, that would not be sufficient to show that U.S. antitrust jurisdiction exists. Statoil incorrectly assumes that because proof of an anticompetitive effect on the U.S. is a ***necessary*** element, it must also be ***sufficient***, standing alone, to establish jurisdiction. As every court that has decided this issue has held, the FTAIA requires proof not only of a domestic anticompetitive effect, but also that the plaintiff's injury arose

II. The Fifth Circuit Correctly Held that There Is No Jurisdiction in this Case

There is a reason no plaintiff has persuaded any court to assert antitrust jurisdiction over the claims of a plaintiff in a foreign market with no injuries arising from an effect on U.S. commerce: both the Sherman Act and the FTAIA preclude jurisdiction in such cases.

A. The Sherman Act Does Not Apply to Commerce Within or Between Foreign Nations

First, Statoil does not even attempt to challenge the Fifth Circuit's holding that Statoil's claims are outside the scope of the Sherman Act itself. App. 12a. The Act applies only to actions affecting "trade or commerce among the several states or ***with*** foreign nations." 15 U.S.C. §§ 1, 2 (emphasis added). Statoil, a Norwegian company, purchased heavy-lift services in the Norwegian sector of the North Sea from foreign entities like Saipem. Thus, it improperly seeks to apply the Act to commerce ***between*** foreign nations. *See* IA Phillip Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 273, at 383 (1997) (term "commerce . . . with foreign nations" "generally refers to

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from that effect. Courts that find no U.S. effect obviously have no need to address whether the plaintiff's injury arose from that nonexistent effect.

transactions in which a foreign seller deals with an American purchaser, or vice-versa. . . . ") ("AREEDA"). This conclusion is further supported by the presumption that, absent an "affirmative intention of the Congress, clearly expressed," a statute is "primarily concerned with domestic conditions." *See EEOC v. Aramco,* 499 U.S. 244, 248 (1991). Because Statoil has waived this independent ground supporting the Fifth Circuit's judgment, *see Taylor v. Freeland & Kronz,* 503 U.S. 638, 645-46 (1992), granting the writ would be futile, as Statoil would not be entitled to reversal even if the Court agreed with its challenges to the Fifth Circuit's holdings on the FTAIA and standing. The Petition should be denied on this ground alone.

B. The FTAIA Precludes Jurisdiction Over Statoil's Claims

Statoil argues that § 6a(2)'s requirement that the effect on U.S. commerce must "give[ ] rise to a claim" under the Sherman Act means that as long as someone sustained an antitrust injury in the U.S. market as a result of the defendants' conduct, then anyone, anywhere in the world who sustained an injury in a foreign market as a result of the same "conduct" likewise may invoke the jurisdiction of U.S. courts. Statoil's argument is contrary to the text of the statute, its legislative history, and fundamental policy concerns underlying the statute's passage.

1. The Plain Language of the FTAIA Precludes Jurisdiction

The FTAIA removes Sherman Act jurisdiction over certain transactions in commerce with foreign nations, making it inapplicable to "conduct involving trade or commerce . . . with foreign nations" unless "(1) such conduct has a direct, substantial and reasonably foreseeable effect" on U.S. domestic or import commerce, and "(2) such effect gives rise to a claim" under the Sherman Act. *See* 15 U.S.C. § 6a. Statoil's claims are not cognizable under the plain text of the statute, because Statoil does not allege that its claims arise out of any effect on U.S. commerce. Rather, its claims arise out of an effect, if any, on foreign commerce. App. 14a-16a. *See Sumitomo,* 117 F. Supp. 2d at 883 ("The most natural way of reading this language is that antitrust laws do not apply unless the ***effects*** are the same. In other words, the Sherman Act claim that a plaintiff alleges and the Sherman Act claim that arises out of the effect on an American market must be the same.") (emphasis in original).

The Fifth Circuit applied the FTAIA in this straightforward manner. Under the FTAIA, the ***conduct*** must have a direct, substantial, and reasonably foreseeable effect on U.S. commerce, and "***such effect***" on U.S. commerce must give rise to the claim. Statoil's claims arise out of alleged effects in the Norwegian sector of the North Sea, in its transactions with British or Dutch entities, not from inflated prices it alleges were felt by other purchasers participating in the U.S. marketplace in the Gulf of Mexico. Statoil's proffered interpretation seeks to avoid the FTAIA's requirement that the *effect* on domestic commerce must give rise to its claim, by suggesting – contrary to the statute – that it need plead only that the "***conduct***" give rise to a claim by someone else in the U.S. marketplace. *See* App. 15a; Pet. at i.

Statoil's textual challenge to the Fifth Circuit's decision is based entirely on the FTAIA's use of a single word in § 6a(2): "a." Quoting the Dissent, Statoil argues that " '[t]he word "a" has a simple and universally understood meaning. It is the indefinite article.' " Pet. 11 (quoting App. 24a-25a). From this purportedly universal truth, Statoil concludes that "gives rise to a claim" must mean "gives rise to ***any*** claim." *Id.*

But "a" may and often does have a specific reference. As explained by the very treatise on which Statoil relies,[7] the meaning of "a" must be determined from its context:

> The word "a" has varying meanings and uses. . . . ***[T]he meaning depends on context. For example, in Workers' Compensation Act, on, or in or about "a" railway, factory, etc., was held not to mean any railway, factory, etc., but the railway, factory, etc. of the employer.***

DELUXE BLACK'S LAW DICTIONARY 1 (6th ed. 1990) (emphasis added).[8] The fact that "a" is frequently specific is well recognized elsewhere in the law. *See U.S. v. Maldonado-Rivera*, 922 F.2d 934, 960 (2d Cir. 1990) (holding references to "a conspiracy" meant "the conspiracy" with which defendant was charged). Rule 12(b)(6) of the Federal Rules of Civil Procedure likewise permits dismissal for failure to state "a" claim, but is applied when the plaintiff has failed to make allegations supporting the plaintiff's ***own*** claim. *See, e.g., Schlesinger v. Herzog*, 2 F.3d 135, 138 (5th Cir. 1993) (affirming dismissal of claims under Rule 12(b)(6) when ***plaintiffs*** failed to allege that ***they*** were purchasers with standing to bring claim).

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[7] Statoil relies on Black's Law Dictionary, but quotes only the definition of "the." *See* Pet. 11 n.9.

[8] As another treatise explains, "[a]lthough *a* and *an* are indefinite in meaning, reference may be general (any person or thing of that class or kind) or more particular (an actual example of the class or kind)." THE OXFORD ENGLISH DICTIONARY OF ENGLISH GRAMMAR 200 (1994) (providing as an example the sentence,

In this case, the context of the FTAIA establishes that "a" should be interpreted as referring to the injury sought to be redressed in the case. The statute on its face is designed to ***restrict*** the scope of jurisdiction in Sherman Act cases. *See* 15 U.S.C. § 6a ("Sections 1 to 7 of this title ***shall not apply*** . . . ***unless*** . . . . "). Statoil's interpretation turns the FTAIA on its head, expanding the reach of U.S. antitrust laws to authorize jurisdiction over the claims of every participant in a foreign marketplace who alleges that someone else, who participated in U.S. commerce, also sustained an injury. Nothing in the FTAIA indicates an intent by Congress to turn the U.S. district courts into the world's forum for settling competition-related grievances. *See* App. 15a-16a.[9]

"I've still got a card my grandfather sent from Kabul (*specific*: a particular card and no other)").

[9] The presumption against extraterritoriality further supports this interpretation. *See* page 15, *supra*. Statoil's contention that this presumption does not apply because the FTAIA addresses extraterritoriality assumes the answer to the question in this case: How far do the U.S. antitrust laws reach

Statoil further contends that the Fifth Circuit, by reading § 6a(2) to require that the U.S. effects give rise to the plaintiff's claims, renders superfluous the following proviso:

> "If [the Sherman Act] appl[ies] to such conduct only because of operation of paragraph (1)(B) [*i.e.*, based solely on effects on export commerce], then [the Sherman Act] shall apply to such conduct ***only for injury to export business in the United States.***"

Pet. 14 (quoting 15 U.S.C. § 6a) (emphasis added). But the proviso on its face is not designed to limit claims to those that stem from the forbidden effect on U.S. export commerce. Rather, the proviso's plain language imposes an ***additional*** restriction: in export cases, it limits the type of business that may sustain a compensable loss to "export business in the United States." Simply put, § 6a(2) limits the requisite ***source*** of an actionable injury – effects on U.S. commerce – while the proviso addresses the ***identity*** and ***location*** of businesses that may sustain compensable injuries in export cases – export business in the United States. *See Sumitomo,* 117 F. Supp. 2d at 884. In the absence of the proviso, foreign purchasers of a U.S. exporter's products could sue under the U.S. antitrust laws after showing that their injury arose from the forbidden "effect" on U.S. export commerce. *Id.*

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under the FTAIA? Because Congress has not clearly expressed an intent to reach injuries arising in wholly foreign commerce (indeed, it has clearly expressed the opposite intent), the presumption applies.

2. The Legislative History of the FTAIA Confirms that There Is No Jurisdiction

Unable to find support in the FTAIA's language, Statoil spends the bulk of its petition arguing about legislative history. But where, as here, there is a "straightforward statutory command, there is no reason to resort to legislative history." *U.S. v. Gonzales*, 520 U.S. 1, 6 (1997).

In any event, the legislative history squarely supports the Fifth Circuit's interpretation. The report of the Judiciary Committee makes clear that one of the "considerations providing the basis for this legislation" was the concern that "courts differ in their expression of the proper test for determining whether United States antitrust jurisdiction over international transactions exists." H.R. REP. No. 97-686, at 2. Thus, as Statoil recognizes, one of the main purposes of the FTAIA is "to more clearly establish when antitrust liability attaches to international business activities." *Id*. at 7. *See* Pet. 2. Consistent with the plain text of the FTAIA, the legislative history confirms Congress' intent to reach international activities only when the plaintiff has participated in the U.S. market, such that its claims arise from the forbidden effect of the defendant's activities on U.S. commerce:

> . . . H.R. 5235 preserves antitrust protections ***in the domestic marketplace*** for all purchasers, regardless of nationality or the situs of the business . . . .

H.R. REP. 97-686, at 10.

The committee also expressed the hope that "the clarified reach of our own laws could encourage our trading partners to take more effective steps to protect competition in their markets." *Id.* at 14. Under Statoil's reading of the statute, this purpose would be superfluous: only by clarifying that the U.S. antitrust laws ***do not*** protect competition in foreign markets would the FTAIA encourage our trading partners to enact their own competition laws. As explained in more detail below, Congress' goal has largely been realized, as the vast majority of nations involved in world trade have adopted competition laws of their own. *See* pages 26-27, *infra.*

Furthermore, the Committee made clear that the "claim" to which the legislation referred was the injury for which the plaintiff or the government seeks redress, not the injury of someone else:

> The Committee did not believe that the bill reported by the Subcommittee was intended to confer jurisdiction ***on injured foreign persons*** when that injury arose from conduct with no anticompetitive effects in the domestic marketplace. Consistent with this conclusion, the full Committee added language to the Sherman and FTC Act amendments to require that ***the "effect" providing the jurisdictional nexus must also be the basis for the injury alleged*** under the antitrust laws. This does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States. As previously set forth, it is sufficient that the conduct providing the basis of the claim has had the requisite impact on the domestic or import commerce of the United States, or, in the case of conduct lacking such an

> impact, on an export opportunity of a person doing business in the United States.

Id. at 11-12, 13 (emphasis added).[10]

Statoil points to nothing in the committee report that states that Congress intended the FTAIA to allow anyone, anywhere in the world to sue under the U.S. antitrust laws upon a showing that some ***other*** person has a claim arising out of the U.S. effects of the alleged conduct. Rather, when read in context, the majority of the quotations that Statoil plucks from the legislative history merely stand for the unremarkable proposition that foreign parties who are ***injured in the U.S. market*** may sue under the U.S. antitrust laws for that injury so long as they can show that the conduct had a direct, substantial, and reasonably foreseeable effect on the U.S. domestic market. *See, e.g.*, Pet. 8, 15, 18. Statoil, however, does not allege that its injury arose from such U.S. market effects.

In its most selective use of legislative history, Statoil omits key sentences (emphasized below) that confirm that foreign purchasers may recover under the FTAIA only for injuries sustained in domestic commerce:

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[10] Statoil contends that this section of the committee report shows that Congress intended to require only that the conduct have an anticompetitive effect on U.S. commerce. Pet. 13 n.11. While the first sentence certainly refers to an anticompetitive effect, the second sentence plainly requires that the injury for which redress is sought must arise out of that effect. *See* H.R. REP. 97-686, at 12 ("[T]he 'effect' providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws."). The last two sentences merely provide that the party need not be physically in the U.S. when it sustains the injury. For example, while the government of India may have suffered its injury abroad in *Pfizer*, it suffered injury as a result of pharmaceuticals purchases in the U.S. market. *See* pages 10-11, *supra*.

> A course of conduct in the United States – *e.g.*, price fixing not limited to the export market – would affect all purchasers of the target products or services, whether the purchaser is foreign or domestic. The conduct has the requisite effects within the United States, even if some purchasers take title abroad or suffer economic injury abroad. *Cf., e.g., Pfizer Inc., et al. v. Government of India, et al,* 434 U.S. 308 (1978). ***Foreign purchasers should enjoy the protections of our antitrust laws in the domestic marketplace,*** just as our citizens do. Indeed, to deny them this protection could violate the Friendship, Commerce and Navigation treaties this country has entered into with a number of foreign nations.
>
> There are other reasons for preserving the rights of foreign persons to sue under our laws when the conduct in question has a substantial nexus to this country. As the Supreme Court pointed out in *Pfizer, supra,* 434 U.S. at 314-315, to deny foreigners a recovery could under some circumstances so limit the deterrent effect of United States antitrust law that defendants would continue to violate our laws, willingly risking the smaller amount of damages payable only to injured domestic persons.

H.R. Rep. No. 97-686, at 10 (emphasis changed). *Compare* Pet. 18. Courts that have considered the portions of the committee report cited by Statoil conclude that they compel the conclusion that the FTAIA permits suit "only where the conduct complained of had 'direct, substantial and reasonably foreseeable effects' in the United States and the effects giving rise to jurisdiction are also the basis of the alleged injury." *E.g., Christie's,* 129 F. Supp. 2d at 624-25. Nothing in the committee report "say[s] that jurisdiction actually exists if the plaintiff actually makes the purchase abroad and does not otherwise participate in a U.S. market." *In re Microsoft Corp.,* 127 F. Supp. 2d at 715.

Most of the remaining passages from the legislative history cited by Statoil suggest that the requisite effect on domestic commerce must be anticompetitive. *See, e.g.,* Pet. 12-13. The committee report makes clear, however, that the FTAIA was not intended to change prior law as to when antitrust injury or an anticompetitive effect must be shown, or the nature of such a showing. *See* H.R. REP. 97-686, at 13 (stating the FTAIA "does not affect the legal standards for determining whether conduct violates the antitrust laws, and thus the substantial antitrust issues on the merits of a claim would remain unchanged"). Although Statoil quotes Rep. Rodino's "Additional Views" to support its argument that the "gives rise to a claim" language was added to require that the effect must be anticompetitive, Pet. 12, nothing in his statement addresses whether the injury for which redress is sought must also arise out of a domestic, rather than foreign, anticompetitive effect. Moreover, Rep. Rodino's "Additional Views" cannot override the report adopted by the full committee, which expressly states that the language was changed to ensure that the injury for which redress is sought arose from the prohibited domestic effect:

> [T]he full Committee added language to the Sherman and FTC Act amendment to require that the "effect" providing the jurisdictional

> nexus must also be the basis for the injury alleged under the antitrust laws.

H.R. REP. 97-686, at 12.

3. Policy Considerations Support the Fifth Circuit's Decision

Statoil ultimately retreats to the argument that the Fifth Circuit's construction of the statute "undermines the deterrent effect of the federal antitrust laws." Pet. 16. But "policy considerations cannot override [the] interpretation of the text and structure" of a statute. *Central Bank v. First Interstate Bank*, 511 U.S. 164, 188 (1994). As previously established, Congress has determined that U.S. markets will be sufficiently protected if persons who sustain injuries in U.S. domestic markets can bring claims. Statoil's dissatisfaction with this judgment in no way justifies rewriting the statute.

Notably, Statoil focuses almost exclusively on whether the Fifth Circuit's decision "undermines the deterrent effect of the federal antitrust laws." Pet. 16. It offers no serious argument – much less empirical evidence – that the Fifth Circuit's decision will result in insufficient deterrence of international cartels generally. This omission is no oversight. The penalties available under U.S. law as well as the law of other nations provide ample deterrence, both before and after the Fifth Circuit's decision.

For example, violators of the U.S. antitrust laws remain subject to treble damages in private actions for all effects on U.S. commerce.[11] They may also be subject, in government actions, to prison sentences, restitution, and substantial fines. Statoil does not explain why any rational corporation and its officers would subject themselves to this array of penalties – including felony conviction and the loss of personal liberty – by participating in any part of an international conspiracy affecting U.S. commerce. It certainly cannot be assumed that rational businesses and corporate officers would consider these penalties to be a reasonable cost of doing business.

Furthermore, Statoil itself has made clear that foreign competition laws provide ample deterrence. Statoil's submissions to the district court show that Norway's antitrust regime would apply to the conduct alleged by Statoil, and that, upon proof of a violation, the Defendants would have to disgorge and pay Statoil its full damages. 16 R. 675-74. Indeed, Statoil has commenced proceedings in Norway. Pet. 10 n.8.

Moreover, as of 1998, 70 countries, comprising 86% of world trade, had enacted their own competition laws. *See* Mark R.A. Palim, *The Worldwide Growth of Competition Law: An Empirical Analysis,* ANTITRUST BULLETIN 105, 109 (March 22, 1998). Just two years later, the number had increased to nearly 90, and roughly 20 more were in the process of drafting such laws. *See* A. Douglas Melamed, Promoting Sound Antitrust Enforcement in the Global Economy, Address Before the Fordham Corporate Law Institute 27th Annual Conference on International Antitrust Law and Policy (October 19, 2000), *available at* <www.usdoj.gov/atr/public/speeches/6785.htm>. Thus, the congressional goal of encouraging the adoption of antitrust regimes abroad has been fulfilled. *See* pages 20-21, *supra* (discussing H.R. REP. 97-686, at 14).

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[11] Neither Saipem nor the other defendants argue that foreign parties should be denied the right to sue under the antitrust laws, ***provided that the other requirements of the FTAIA are met*** (*i.e.,* their injury arises from a direct, substantial and reasonably foreseeable effect on domestic commerce). The Fifth Circuit's ruling does nothing to limit the rights of consumers, domestic or foreign, injured in U.S. commerce. *See* pages 2-4, *supra.*

This congressional goal also confirms that Congress did not intend the United States to be the world's forum for the resolution of all competition-related grievances. As the Fifth Circuit observed, Statoil's strained interpretation of the FTAIA would permit persons and entities all over the world who have no contact with U.S. markets to file suit in the United States claiming that they were injured by conduct that also had an effect on U.S. commerce. App. 22a.

The "authorities" that Statoil cites to support its "policy" argument share the same infirmity suffered by its citations to cases and legislative history: none states that the FTAIA permits suits by foreign purchasers of foreign goods or services who sustained their harm in foreign markets. Certainly, *Pfizer* makes no such statement. *See* pages 10-11, *supra*. Nor do the passages from the Department of Justice materials on which Statoil relies state that a foreigner's injuries in a foreign market support U.S. antitrust jurisdiction. *See* U.S. Dep't of Justice, Antitrust Div., International Competition Pol'y Advisory Comm., *Final Report to the Attorney General and Assistant Attorney General for Antitrust* 247 (Feb. 2000) ("DOJ Report"), *cited in* Pet. 17, 20 n.15, 21 n.16; U.S. Dep't of Justice & Federal

Trade Comm'n, *Antitrust Enforcement Guidelines for International Operations* § 3.12 (1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,107, *cited in* Pet. 19, 27.

Statoil has simply offered no support for the suggestion that, unless U.S. antitrust law is extended to circle the globe, international cartels will overrun the world.

III. The Fifth Circuit's Judgment Can Be Supported on the Independent Ground that Statoil Lacks Standing

Statoil's lack of standing presents an independent ground for affirming the judgments of the district court and the Fifth Circuit. Statoil contends that if the FTAIA permits antitrust jurisdiction, then Statoil necessarily has standing. *See* Pet. 7 n.5. But antitrust standing requires a more intensive inquiry. *See Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519, 535 n.31 (1983). A private plaintiff must prove "antitrust injury," which requires "injury of the type that antitrust laws were intended to prevent and that flows from that which makes the conduct illegal." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 333, 334 (1990). Statoil's claims meet neither requirement.

First, Statoil's alleged injury is not of the type the antitrust laws were intended to prevent: "[T]he concern of the [U.S.] antitrust laws is the protection of ***American*** consumers and ***American*** exporters, not foreign consumers or producers." AREEDA, ¶ 272h2, at 362-63 (emphasis in original). Statoil alleges that, although its injury arose in foreign commerce, the U.S. antitrust laws nevertheless apply because consumers in U.S. commerce suffered injury. Statoil, however, may not recover based on harms to those consumers. *See de Atucha v. Commodity Exchange, Inc.*, 608 F. Supp. 510, 518 (S.D.N.Y. 1985) (plaintiff injured in foreign commerce cannot claim standing based on injury to consumers in domestic commerce); *In re Microsoft*, 127 F. Supp. 2d at 716 (holding that, even if jurisdiction were proper under the FTAIA, foreign plaintiffs who suffered effects in foreign commerce had no standing).

Second, Statoil's injury does not "flow[ ] from that which makes defendants' acts unlawful." *Atlantic Richfield*, 495 U.S. at 334. Under the FTAIA, merely engaging in conduct that has anticompetitive effects in ***foreign commerce*** does not violate the U.S. antitrust laws. Conduct is rendered unlawful only when it causes anticompetitive effects in ***U.S. commerce***. But Statoil cannot argue that its injury "flows from that which makes defendants' acts unlawful" – the alleged effect on U.S. commerce. Accordingly, even if jurisdiction exists under the FTAIA, the Fifth Circuit's judgment should be affirmed based on Statoil's lack of standing.

◆

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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July 12, 2001

United States Court of Appeals,
Fifth Circuit

DEN NORSKE STATS OLJESELSKAP AS,
Plaintiff-Appellant,

v.

HEEREMAC VOF; Heerma Marine Contractors; Heerema Offshore Services U.S., Inc.; Heerema Offshore Construction Group, Inc.; Jan Meek; Pieter Heerema; McDermott International, Inc.; McDermott, Inc.; J. Ray McDermott, SA; J. Ray McDermott, Inc.; J. Ray McDermott Gulf Contractors, Inc.; McDermott Engineers & Constructors (USA), Inc.; McDermott Engineering Houston LLC; McDermott - ETPM, Inc.; Saipem SPA; Saipem International BV; Saipem UK Limited; Saipem (Portugal) -- Comercio Maritimo, Sociedade Unipessoal, SA,
Defendants-Appellees.

No. 99-20763

Feb. 5, 2001

Norwegian oil corporation brought antitrust conspiracy claim against providers of heavy-lift barge services. The United States District Court for the Southern District of Texas, Melinda Harmon, J., dismissed for lack of subject matter jurisdiction, and appeal was taken. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that antitrust laws did not apply to plaintiff's claims that anticompetitive conspiracy inflated its North Sea operating costs.

Affirmed.

Patrick E. Higginbotham, Circuit Judge, dissented and filed opinion.

Arthur R. Miller (argued), Cambridge, MA, Jacob Dweck, Rebecca L. Hirsch, Sutherland, Asbill & Brennan, Washington, DC, James R. McGibbon, Sutherland, Asbill & Brennan, Atlanta, GA, Craig Barkell Glidden, Patricia Hall Webb, Jeffrey Alan Kaplan, McFall, Glidden, Sherwood & Breitbeil, Houston, TX, for Plaintiff-Appellant.

Jonathan D. Schiller, William A. Isaacson, Boies, Schiller & Flexner, Washington, DC, for Heeremac Vof, Heerma Marine Contractors, Heerema Offshore Services U.S., Inc., Heerema Offshore Constr. Group, Inc., Meek and Heerema.

William J. Linklater, Michael A. Pollard, Baker & McKenzie, Chicago, IL, Jacks C. Nickens, Clements, O'Neill, Pierce, Nickens & Wilson, Houston, TX, for Heerma Marine Contractors, Heerema Offshore Services U.S. Inc., Heerema Offshore Construction Group Inc., Jan Meek and Pieter Heerema.

Charles Alan Gilman (argued), Patricia Farren, Cahill, Gordon & Reindel, New York City, Innes A. Mackillop, White, Mackillop & Boham, Houston, TX, for McDermott Intern., Inc., McDermott, Inc., J. Ray McDermott SA, J. Ray McDermott Inc., J. Ray McDermott Gulf Contractors Inc., McDermott Engineers & Constructors (USA) Inc., McDermott Engineering Houston LLC and McDermott-ETPM Inc.

Robin C. Gibbs, Kathy Dawn Patrick (argued), John Albert Basinger, Gibbs and Bruns, Houston, TX, for Saipem SPA, Saipem Intern. BV, Saipem UK Ltd. and Saipem (Portugal)-Comercio Maritimo, Sociedade Unipessoal, SA.

Appeal from the United States District Court for the Southern District of Texas.

Before JOLLY, HIGGINBOTHAM and EMILIO M. GARZA, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This appeal requires us to interpret the scope of the United States antitrust laws and their application to foreign conduct. The plaintiff is a Norwegian oil corporation that conducts business solely in the North Sea. It seeks redress under the United States antitrust laws against the defendants for an alleged anticompetitive conspiracy that supposedly inflated the plaintiff's operating costs in the North Sea. Supreme Court precedent makes clear as a general proposition that United States antitrust laws "do not regulate the competitive conditions of other nations' economies," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). More specifically, today we are bound by the plain language of the Foreign Trade Antitrust Improvements Act (FTAIA). Thus, even though the plaintiff alleges that the antitrust conspiracy raised prices in the United States, it fails to assert jurisdiction under the antitrust laws because the plaintiff's injury did not arise from that domestic anticompetitive effect. Accordingly, we find that the district court properly dismissed the plaintiff's antitrust claims for lack of subject matter jurisdiction. It follows that we affirm the court's determination that the plaintiff lacked antitrust standing to bring these claims in United States federal court.

I

We begin with the basics. Sections 1 and 2 of the Sherman Act prohibit restraints of trade and monopolization. Section 1 reads:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

15 U.S.C. § 1. Section 2 of the Sherman Act states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or

> commerce among the several States, or with foreign nations, shall be deemed guilty of a felony....

15 U.S.C. § 2. The FTAIA, enacted by Congress in 1982 to clarify the application of United States antitrust laws to foreign conduct, limits the application of such laws when non-import foreign commerce is involved. The FTAIA states that the antitrust laws will not apply to non-import commerce with foreign nations unless the conduct at issue has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce *and* "such effect gives rise to a claim under" the antitrust laws.[1]

II

The plaintiff, Den Norske Stats Oljeselskap As ("Statoil"), is a Norwegian oil company that owns and operates oil and gas drilling platforms exclusively in the North Sea. The defendants are providers of heavy-lift barge services in the Gulf of Mexico, the North Sea, and the Far East. Only six or seven heavy-lift barges exist in the world. These immense vessels have cranes capable of hoisting and transporting offshore oil platforms and decks weighing in excess of 4,000 tons. During the 1993-1997 time frame, which is at issue in this suit, the three defendants controlled these barges.[2] Between 1993 and 1997, Statoil purchased heavy lift barge services from the HeereMac and Saipem defendants in the North Sea.

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[1] 15 U.S.C. § 6a. In full, the FTAIA reads:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect--
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section. [Proviso] If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

Statoil alleges that the defendants conspired to fix bids and allocate customers, territories, and projects between 1993 and 1997. Under the alleged arrangement, the defendants agreed that HeereMac and McDermott would have exclusive access to heavy-lift projects in the Gulf of Mexico, while Saipem would receive a higher allocation of North Sea projects in exchange for staying out of the Gulf. The defendants also allegedly agreed to submit embellished bids on heavy-lift projects. As a result of this conspiracy, Statoil contends that it paid inflated prices for heavy-lift barge services in the North Sea.[3] Statoil further argues that the conspiracy compelled it to charge higher prices for the crude oil it exported to the United States.[4] Finally, Statoil asserts that purchasers of heavy-lift services in the Gulf of Mexico were forced to pay inflated prices for those services because of the conspiracy.[5]

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[2] The first group of defendants, HeereMac v.o.f. and its subsidiaries, a foreign corporation with its principal place of business in The Netherlands, controlled four or five of the barges. Saipem S.P.A., a British company, controlled one heavy-lift barge. McDermott, Inc., an American corporation, apparently controlled the last barge.

[3] Statoil does not allege that it purchased any heavy-lift services in the United States or that the contracts it entered into included agreements to apply United States law.

[4] Statoil asserts that it has exported an average of 400,000 barrels of oil a day into the United States over the past three years. Statoil does not, however, allege any injury to itself derived from its export of oil to the United States.

III

By way of background, it should be noted that in December 1997, the United States Department of Justice filed a criminal complaint against defendants HeereMac and Jan Meek, one of HeereMac's managing directors. The complaint alleged that the defendants conspired "to suppress and eliminate competition by rigging bids for the sale of heavy-lift derrick barge and related marine construction services in the United States and elsewhere."[6] HeereMac and Meek submitted to United States jurisdiction and pled guilty to the charges. They agreed to pay fines of $49 million and $100,000, respectively.

Following the guilty pleas, numerous companies across the globe filed suit in United States federal court seeking redress for injuries stemming from defendants' conduct. The first of these suits was filed in the Southern District of Texas in June 1998 by Phillips Petroleum Company and three of its foreign-based subsidiaries.[7]

On January 22, 1999, the court dismissed Phillips's claims for injuries sustained by its foreign subsidiaries relating to projects in foreign waters but allowed those claims asserting injury from projects in United States waters to proceed. While the court acknowledged the worldwide nature of the alleged conspiracy in its order, it nonetheless held that subject matter jurisdiction did not exist for those claims pled by foreign-based subsidiaries for injuries allegedly sustained on foreign platforms.[8] Specifically, the court determined that those claims did not fall within the ambit of the United States antitrust laws because the claims did not arise from a direct and substantial effect on United States commerce.[9]

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[5] Statoil does not allege that it owns, operates, or commissions any oil exploration platforms within United States waters, or that it conducted business with any of the defendants incorporated in the United States.

[6] The plea agreement separately addressed issues related to commerce affected by defendants' conduct in the Gulf of Mexico and commerce affected by defendants' activity in the North Sea and Far East.

[7] A group of about forty plaintiffs brought a second suit against defendants in the Northern District of Texas.

Statoil filed this suit in the same court in December 1998. The court dismissed Statoil's complaint against the defendants on July 12, 1999.[10] In its order, the court relied heavily upon its decision in the Phillips case and found no subject matter jurisdiction over the claims because "Statoil's damages arise from its projects in the Norwegian sector of the North Sea"; thus, the FTAIA's requirement that the effect on domestic commerce "gives rise" to the antitrust claim was not satisfied. *See* 15 U.S.C. § 6a(2). The court also held that the defendants' conspiracy "did not have a direct, substantial, and reasonably foreseeable anticompetitive effect on United States trade or commerce" under the FTAIA. *See* 15 U.S.C. § 6a(1). Finally, the court determined that "Statoil lacks standing to bring a claim under United States antitrust laws because its alleged injuries are not of the type that the antitrust statute was intended to redress."[11] Statoil timely appealed the judgment.

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[8] The court determined it did have subject matter jurisdiction over the alleged conspiracy and injury "relating to the Mahogany project in the territorial waters of the United States in the Gulf of Mexico."

[9] The court stated that "the claims of the foreign-based [subsidiaries] regarding injuries sustained in relation to the foreign platforms" were not justiciable in United States courts because "the primary injury to that party must be caused in the United States and substantially affect United States commerce."

[10] The defendants filed motions to dismiss based on lack of subject matter jurisdiction (Rule 12(b)(1)) and failure to state a claim under the Sherman Act (Rule 12(b)(6)).

[11] The court then declined to exercise supplemental jurisdiction over the remaining common law claims pursuant to 28 U.S.C. § 1367(c)(3).

IV

The issue presented to us is primarily one of statutory interpretation. Specifically, this appeal requires us to interpret the relevant provisions of the FTAIA to determine whether the defendants' conduct and Statoil's injury in the North Sea presents a justiciable claim in the federal courts of the United States.

It is not helpful that the federal courts have generally disagreed as to the extraterritorial reach of the antitrust laws and have employed assorted tests to determine the scope of the Sherman Act. The history of this body of case law is confusing and unsettled.[12] However, as far as this appeal is concerned, our work is simplified by Congress' passage in 1982 of the FTAIA, which specifically exempts certain foreign conduct from the antitrust laws. This circuit has never interpreted the relevant portions of the FTAIA as they apply to global conspiracies and resulting foreign injury.[13] Today, we take on this task, and make no claim that it is an easy one.

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[12] The first case to consider the extraterritorial application of United States antitrust law was *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909). In that case, Justice Holmes announced that the Sherman Act could have no application to conduct that occurred outside of the United States. *Id.* at 357, 29 S.Ct. 511. However, as the United States became increasingly involved in foreign commerce in the years following *American Banana*, the Supreme Court relaxed its previous stance and held that the Sherman Act authorized jurisdiction over foreign defendants so long as domestic commerce was affected and some conduct occurred within the United States *See United States v. Sisal Sales Corp.*, 274 U.S. 268, 276, 47 S.Ct. 592, 71 L.Ed. 1042 (1927). In 1945, the Second Circuit laid the groundwork for what became known as the "effects test" to determine antitrust jurisdiction over foreign conduct. In *United States v. Aluminum Company of America ("Alcoa")*, 148 F.2d 416 (2d Cir.1945), Judge Learned Hand determined that a United States court would have jurisdiction over the conduct of foreign corporations where that conduct was intended to, and actually did, affect United States commerce. *Id.* at 443-44. The *Alcoa* effects test has been gradually adopted by most federal courts, albeit in various forms. The already confused effects test was even more imprecise following the Ninth Circuit's decision in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 613 (9th Cir.1976). In that case, the court introduced a balancing test that considered principles of comity in addition to domestic effects when determining the scope of antitrust jurisdiction over foreign defendants. The Fifth Circuit adopted a similar comity-informed approach. *See American Rice, Inc. v. Arkansas Rice Growers Co-op. Ass'n*, 701 F.2d 408, 413 (5th Cir.1983). Most recently, in 1993, the Supreme Court confirmed that "the Sherman Act applies to foreign conduct that was

V

A

We review *de novo* a district court's ruling on a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.[14] *See Hebert v. United States,* 53 F.3d 720, 722 (5th Cir.1995). In ruling on a motion to dismiss for lack of subject matter jurisdiction, a court may evaluate (1) the complaint alone, (2) the complaint supplemented by undisputed facts evidenced in the record, or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *See Barrera-Montenegro v. United States,* 74 F.3d 657, 659 (5th Cir.1996). Nevertheless, we must accept all factual allegations in the plaintiff's complaint as true. *See Williamson v. Tucker,* 645 F.2d 404, 412 (5th Cir.1981).

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meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 796, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993).

[13] In fact, no circuit appears to have interpreted the critical portion of the FTAIA at issue in this case--the requirement that the domestic effect on commerce "gives rise" to the antitrust claim. 15 U.S.C. § 6a(2).

[14] It is true that the defendants filed 12(b)(6) motions along with their 12(b)(1) motions. However, the district court's order establishes that the court dismissed the claims for lack of subject matter jurisdiction rather than failure to state a claim under the antitrust laws: [T]he court orders that Defendants' motions to dismiss for lack of subject matter jurisdiction are granted and that this case is dismissed without prejudice. All remaining pending motions are moot.

We first outline Statoil's argument that United States antitrust jurisdiction encompasses the conduct and injury in its complaint.

B

Statoil argues that the FTAIA does not preclude the district court's jurisdiction over its antitrust claims. Specifically, Statoil argues that the FTAIA was enacted exclusively to ensure that the conduct providing the basis of the plaintiff's claim have the requisite domestic effects, and was not intended to preclude recovery to foreign plaintiffs based on the situs of the injury.[15] Moreover, Statoil contends that Section 2 of the FTAIA was inserted only to ensure that the effect on United States commerce that provides jurisdiction is itself a violation of the antitrust laws; that is, the statute simply requires that there be some anticompetitive, ***harmful*** effect in this country--not just a positive or neutral domestic effect.[16]

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[15] Statoil refers to the legislative history of the FTAIA to support its interpretation: The Committee did not believe that the bill reported by the subcommittee was intended to confer jurisdiction on injured foreign persons when that injury arose from conduct with no anticompetitive effects in the domestic marketplace. Consistent with this conclusion, the full committee added language to the Sherman and FTC Act amendments to require that the "effect" providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws. This does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States. H.R.Rep. No. 97-686, at 12.

[16] Statoil cites additional legislative history in support of this interpretation of the FTAIA:... [T]he domestic "effect" that may serve as the predicate for antitrust jurisdiction under the bill must be of the type that the antitrust laws prohibit. For example, a plaintiff would not be able to establish United States antitrust jurisdiction merely by proving a beneficial effect within the United States, such as increased profitability of some other company or increased domestic employment, when the plaintiff's damage claim is based on an extraterritorial effect on him of a different kind. H.R.Rep. No. 97-686, at 12 (1982) (citation omitted).

Addressing specifically the FTAIA's requirement that the domestic effect "gives rise" to its antitrust claim, Statoil primarily argues that, because the defendants operating in the Gulf of Mexico were able to maintain their monopolistic pricing only because of their overall market allocation scheme (which included agreements regarding operations in the North Sea), Statoil's injury in the North Sea was a "necessary prerequisite to" and was "the quid pro quo for" the injury suffered in the United States domestic market. Statoil alleges that the market for heavy-lift services in the world is a single, unified, global market; therefore, because the United States is a part of this worldwide market, the effect of the conspiracy, whether in the United States or in the North Sea, "gives rise" to any claim that is based upon this conspiracy.[17]

C

We must disagree with Statoil's arguments based on our reading of the antitrust statutes. Although we are controlled by the plain language of the statutes, we also find that the legislative history of the FTAIA and applicable case law supports our determination that the district court lacked jurisdiction over Statoil's claims.

We begin with an analysis of the relevant statutes and the plain language contained therein.

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[17] In addition to its statutory interpretation arguments, Statoil cites a number of cases in an attempt to support its proposition that subject matter jurisdiction exists under the Sherman Act so long as the conspiratorial conduct had an affect on United States commerce. *See Caribbean Broad. Sys., Ltd. v. Cable and Wireless PLC,* 148 F.3d 1080 (D.C.Cir.1998); *United States v. Nippon Paper Indus. Co.,* 109 F.3d 1 (1st Cir.1997); *Hartford Fire,* 509 U.S. 764, 113 S.Ct. 2891, 125 L.Ed.2d 612; *Pfizer, Inc. v. Gov't of India,* 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978). However, none of these cases interpret the relevant provision of the FTAIA (15 U.S.C. § 6a(2)) and, therefore, none of these cases inform our inquiry into the proper interpretation of the "gives rise to" requirement.

1

The Supreme Court has explained that "[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive." *Escondido Mut. Water Co. v. La Jolla Indians,* 466 U.S. 765, 772, 104 S.Ct. 2105, 80 L.Ed.2d 753 (1984). We are thus bound by the plain, ordinary meaning of the language used in the antitrust statutes and, in particular, the FTAIA.

We begin by first noting that the Sherman Act itself applies only to conduct in "trade or commerce *with* foreign nations." 15 U.S.C. §§ 1,2 (emphasis added). The commerce that gives rise to the action here--the contracting for heavy lift barge services in the North Sea--was not United States commerce *with* foreign nations, but commerce *between* or *among* foreign nations--that is, between or among Statoil (a Norwegian corporation), Saipem (England), and HeereMac (The Netherlands). Therefore, we doubt that foreign commercial transactions between foreign entities in foreign waters is conduct cognizable by federal courts under the Sherman Act.[18]

As we have noted, the FTAIA states that the antitrust laws will not apply to non-import foreign conduct unless (1) such conduct has a direct, substantial, and reasonably foreseeable effect on United States domestic commerce, and (2) such effect gives rise to the antitrust claim.[19] The conduct of these defendants is foreign conduct that falls within the general parameters of the FTAIA and, thus, Statoil must show that the two specific requirements of the statute are met to establish subject matter jurisdiction over its claims.[20]

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[18] This interpretation is further strengthened by the limits placed on Congressional power in the Constitution. Article I, § 8 of the Constitution gives Congress the authority only to regulate interstate commerce and "commerce *with* foreign nations" (emphasis added). Thus, even if Congress indeed intended to regulate purely foreign commerce in the Sherman Act, it was not empowered to do so under the Commerce Clause.

[19] The dissent, like Statoil, argues that Section 2 should be read to require only that the domestic effect give rise to *any* antitrust claim, not necessarily the plaintiff's claim. This interpretation contradicts the explicit intent of Congress to require that the effect must give rise to the particular injury claimed by the plaintiff in the suit: ... [T]he full committee added language to the Sherman and FTC Act amendments to

We accept the contention that Statoil has sufficiently alleged that the defendants' conduct--that is, the agreement among heavy-lift service providers to divide territory, rig bids, and fix prices--had a direct, substantial, and reasonably foreseeable effect on the United States market. Statoil alleges that the conspiracy not only forced purchasers of heavy-lift services in the Gulf of Mexico to pay inflated prices, but also that the agreement compelled Americans to pay supra-

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require that the "effect" providing the jurisdictional nexus *must also be the basis for the injury alleged under the antitrust laws.* H.R.Rep. No. 97-686, at 12 (emphasis added). The dissent asserts that reading Section 2 as requiring that the domestic effect give rise to the plaintiff's claim renders the FTAIA's proviso redundant. Although giving the statute a clear understanding is difficult, we disagree with the dissent's reading. We read Section 1(B) to provide that the export commerce covered under the exception must be conducted by a person who is engaged in that export business in the United States. Section 2 provides that the defendant's antitrust effect on this export commerce described in Section 1(B) must give rise to the plaintiff's cause of action. The proviso, in turn, states that the recovery for injuries resulting from the conduct described in Section 1(B), which gives rise to the plaintiff's antitrust claim in Section 2, is limited to injuries occurring in the United States. Therefore, we fail to see the redundancy to which the dissent refers. *See In re Copper Antitrust Litigation v. Sumitomo Corp.*, 117 F.Supp.2d 875, 884 (W.D.Wis.2000) (holding that "[t]he logical interpretation of the language of § 6a is that Congress extends domestic jurisdiction to extraterritorial conduct only when the plaintiffs have been injured by the effects on the domestic market.").

[20] Specifically, Statoil's claim falls under Section 6(a)(1)(A) and not Section 6(a)(1)(B), because defendants' conduct had no substantial effect on export trade with foreign nations.

competitive prices for oil.[21] These allegations are sufficient to satisfy the first requirement of the FTAIA.

However, Statoil fails to show that this effect on United States commerce in any way "gives rise" to its antitrust claim.[22] Based on the language of Section 2 of the FTAIA, the effect on United States commerce--in this case, the higher prices paid by United States companies for heavy-lift services in the Gulf of Mexico--must give rise to the claim that Statoil asserts against the defendants. That is, Statoil's injury must stem from the effect of higher prices for heavy-lift services in the Gulf. We find no evidence that this requirement is met here. The higher prices American companies allegedly paid for services provided by the McDermott defendants in the Gulf of Mexico does not give rise to Statoil's claim that it paid inflated prices for HeereMac and Saipem's services in the North Sea. This is not to say that any antitrust injury suffered by customers or competitors of McDermott that arose from the anticompetitive effect in the Gulf of Mexico cannot be addressed.[23] This means only that, while we recognize that there may be a connection and an interrelatedness between the high prices paid for services in the Gulf of Mexico and the high prices paid in the North Sea, the FTAIA requires more than a "close relationship" between the domestic injury and the plaintiff's claim; it demands that the domestic effect "gives rise" to the claim.[24]

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[21] Statoil's complaint alleges that the defendants' conspiracy adversely affected at least $165 million in United States commerce during the 1993-97 period.

[22] Statoil repeatedly frames the inquiry as whether a plaintiff can suffer injury abroad, or whether the injury itself must be suffered in the United States. This approach is an incorrect formulation of the threshold question and reflects a misreading of the FTAIA. We recognize that many federal courts, including the district court in these proceedings, might have chosen to frame the analysis in this manner. However, the proper inquiry to make here is, regardless of the situs of the plaintiff's injury, did that injury arise from the anticompetitive effects on United States commerce? *See, e.g., Caribbean*, 148 F.3d 1080 (identifying that, while the situs of the injury was overseas, the claim arose from the conspiracy's effects on the United States advertising market).

[23] The dissent notes with disapproval that our interpretation of the FTAIA means that "a foreign cartel that fixes prices worldwide will be subject to suit under the Clayton Act only from plaintiffs injured in American commerce." However, our reading produces the precise result intended by Congress--that "[f]oreign purchasers should enjoy the

Statoil asks that we interpret the requirement of Section 2 that the domestic "*effect* " give rise to a claim under the antitrust laws as merely requiring that the defendants' domestic "*conduct* " (here, for example, agreements relating to the Gulf of Mexico) give rise to a claim. This interpretation is not true to the plain language of the FTAIA. Moreover, under such an expansive interpretation, any entities, anywhere, that were injured by any conduct that also had sufficient effect on United States commerce could flock to United States federal court for redress, even if those plaintiffs had no commercial relationship with any United States market and their injuries were unrelated to the injuries

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protection of our antitrust laws *in the domestic marketplace,* just as our citizens do." H.R.Rep. No. 97-686, at 10-11.

[24] Statoil argues that, had the district court accepted its allegation of a worldwide conspiracy as true, the requirements of the FTAIA would be satisfied and subject matter jurisdiction would exist. We cannot agree. Regardless of the nature of the conspiracy, Statoil must allege an injury that falls within the scope of the antitrust statutes. The assumed existence of a single, unified, global conspiracy does not relieve Statoil of its burden of alleging that its injury arose from the conspiracy's proscribed effects on United States commerce. This principle was stressed by the Supreme Court in *Matsushita:* Respondents also argue that the check prices, the five company rule, and the price fixing in Japan are all part of one large conspiracy that includes monopolization of the American market through predatory pricing. The argument is mistaken. *However one decides to describe the contours of the asserted conspiracy--whether there is one conspiracy or several--respondents must show that the conspiracy caused them an injury for which the antitrust laws provide relief.* 475 U.S. at 584 n. 7, 106 S.Ct. 1348 (emphasis added).

suffered in the United States.[25] Such an expansive reading of the extraterritorial application of the antitrust laws was never intended nor contemplated by Congress. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) (noting that "[w]e assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is the affirmative intention of the Congress clearly expressed, we must presume it is primarily concerned with domestic conditions.") (citation omitted).

In sum, we find that the plain language of the FTAIA precludes subject matter jurisdiction over claims by foreign plaintiffs against defendants where the situs of the injury is overseas and that injury arises from effects in a non-domestic market.[26] Although the plain language of the relevant statutes is clear and controlling, we nonetheless turn now to address briefly the legislative history of the FTAIA to illustrate how that history reinforces our interpretation of the extraterritorial reach of the antitrust laws.

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[25] The dissent repeatedly emphasizes that the antitrust laws have always contemplated foreign plaintiffs recovering for their injuries. We do not disagree. We simply read the FTAIA to provide that, if individuals conspire to restrain trade such that an American market is harmed, the United States antitrust laws can provide redress to any person injured by the domestic effects of the conspiracy, even if the injured party is located overseas. *See Sumitomo*, 117 F.Supp.2d 875, 885 ("On the other hand, the antitrust laws do not apply to an action by a person injured overseas because of price-fixing in a foreign market even if the same defendants engage in price-fixing affecting an American market.").

[26] Statoil alleges that it paid inflated prices for heavy-lift services in the North Sea. This injury, however, does not arise from the alleged effect on United States commerce--that is, the higher prices paid by United States consumers for heavy-lift services in the Gulf of Mexico. While Statoil also asserts that the conspiracy had the effect of raising crude oil prices in the United States, Statoil alleges no injuries to itself occurring in the market for crude oil or arising from this domestic effect.

Before analyzing the legislative history of the FTAIA, we reemphasize that "[l]egislative history is relegated to a secondary source behind the language of the statute in determining congressional intent; even in its secondary role legislative history must be used cautiously." *Boureslan v. Aramco,* 857 F.2d 1014, 1018 (5th Cir.1988) (citation omitted). We are thus "not free to substitute legislative history for the language of the Act." *Id.*

The FTAIA House Report states that the purpose of the law is "to more clearly establish when antitrust liability attaches to international business activities" and to ascertain "the precise legal standard to be employed in determining whether American antitrust law is to be applied to a particular transaction." H.R.Rep. No. 97-686, at 5, 8.[27] Moreover, the relevant House Report shows that Congress intended to exclude purely foreign transactions, like the contract for services in the North Sea between Statoil and the foreign defendants, from the reach of United States antitrust laws:

> A transaction between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws.... It is thus clear that wholly foreign transactions as well as export transactions are covered by the [FTAIA], but that import transactions are not.

Id. at 10.

Thus, the legislative history of the FTAIA, while not controlling, reinforces our conclusion that a foreign plaintiff injured in a foreign marketplace must show that a substantial domestic effect on United States commerce "gives rise" to its antitrust claim.[28]

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[27] The dissent seems to imply that the sole purpose of the FTAIA is to "exempt exporting from antitrust scrutiny." Although this is clearly a primary goal of the legislation, the dissent ignores the second purpose behind the FTAIA--to resolve "possible ambiguity" in the extraterritorial reach of antitrust jurisdiction. *Id.* at 4-5.

We now turn to address briefly applicable case law and its effect on our interpretation of the FTAIA.

3

Because few courts have directly addressed the specific meaning of the FTAIA's Section 2 requirement that a domestic effect "gives rise" to the plaintiff's antitrust claim, very little case law exists to aid our inquiry. Our interpretation of the FTAIA's requirements, however, is entirely consistent with prior case law defining the jurisdictional reach of the antitrust laws. Furthermore, those decisions illustrate that our interpretation of Section 2 is not a novel reading of the statute.

To begin, we note that the only three federal courts that have addressed the narrow question before us interpreted Section 2 exactly as we have. *See Kruman v. Christie's Int'l PLC, et al.,* 129 F.Supp.2d 620 (S.D.N.Y.2001) (holding that the FTAIA permits jurisdiction "only where the conduct complained of had 'direct, substantial and reasonably foreseeable' effects in the United States and the effects giving rise to jurisdiction are the basis for the alleged injury."); *In re Microsoft Corp.*, 2001 U.S. Dist. LEXIS 305, at *37 (holding that, under the FTAIA, "foreign consumers who have not participated in any way in the U.S. market have no right to institute a Sherman Act claim."); *Sumitomo,* 117 F.Supp.2d 875, 876 (holding that "it is plain from the language of this act and bolstered by the legislative history that a private plaintiff cannot sue under the antitrust laws of the United States for injuries incurred as a result of international transactions that have an anticompetitive effect on a United States market if the domestic anticompetitive effect is not the same one that gives rise to the plaintiff's injury.").

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[28] The dissent argues that our decision in this case is contrary to the statement in the legislative history that "[a] course of conduct in the United States ... would affect all purchasers of the target domestic products or services, whether the purchaser is foreign or domestic." Again, we do not assert that foreign purchasers of domestic products can never sue in United States federal court. We only hold that the FTAIA requires that a foreign plaintiff show that its injuries arise from a United States market. This is not a novel reading of the FTAIA: [T]he legislative history [of the FTAIA] reflects that Congress was proceeding from the premise that, wherever title is taken or economic injury is suffered, at least some aspect of the sales transaction took place in the United States. Any doubt on that score is resolved by ... the sentence which states that "foreign purchasers should enjoy the protection of our antitrust laws *in the domestic marketplace,* just as our citizens do." *In re Microsoft Corp. Antitrust Litigation,* 2001 U.S. Dist. LEXIS 305, at *37 (M.D.Md. Jan. 12, 2001).

We further note that we have found no case in which jurisdiction was found in a case like this--where a foreign plaintiff is injured in a foreign market with no injuries arising from the anticompetitive effect on a United States market.[29] In those cases where the domestic effect on commerce did not give rise to the plaintiff's claim, courts have found subject matter jurisdiction lacking. *See, e.g., S. Megga Telecomm. Ltd. v. Lucent Technologies, Inc.*, 1997 WL 86413 (D.Del. Feb.14, 1997) (anticompetitive domestic effect of higher prices for United States consumers did not "give rise" to plaintiff's claim for lost sales to defendant); *The "In" Porters, S.A. v. Hanes Printables, Inc.,* 663 F.Supp. 494 (M.D.N.C.1987) (anticompetitive domestic effect (lost exports of United States exporters) did not "give rise" to plaintiff's claim for lost sales in France due to marketing sales agreement with defendant); *de Atucha v. Commodity Exch., Inc.,* 608 F.Supp. 510 (S.D.N.Y.1985) (conspiracy's effect on silver prices on United States exchange did not "give rise" to plaintiff's injury on London exchange).

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[29] *See Sumitomo,* 117 F.Supp.2d 875, 883 ("So far as can be determined, the issue [of interpreting the language of Section 2] never came up. In the reported cases, the courts had no occasion to address the same effects requirement because in each case, the plaintiffs' injuries arose out of the same effects experienced by the markets.").

On the other hand, in every case where jurisdiction has been found, the substantial effect on United States commerce has "give[n] rise" to the plaintiff's injury and claim under the antitrust laws. *See, e.g., Carpet Group Int'l v. Oriental Rug Importers Ass'n,* 227 F.3d 62 (3rd Cir.2000) (anticompetitive effect on domestic rug market "gives rise" to plaintiff's injury); *Caribbean,* 148 F.3d 1080 (monopolization of United States market for advertising in the Caribbean "gives rise" to plaintiff's claim of being blocked from that market); *Nippon Paper,* 109 F.3d 1 (collusion amongst fax paper producers resulted in higher prices for fax paper in the United States, which "gives rise" to the United States' claim); *Hartford Fire,* 509 U.S. 764, 113 S.Ct. 2891, 125 L.Ed.2d 612 (conspiracy's effect on the United States insurance market "gives rise" to the plaintiffs' injury, the inability to obtain certain types of coverage in that market).

Finally, we note that none of the cases cited by Statoil in support of its interpretation of the FTAIA cast doubt upon our plain language interpretation of Section 2. Statoil cites *Pfizer v. India,* 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978), for the proposition that antitrust jurisdiction exists over foreign conduct like the commerce between Statoil and defendants in this case. *Pfizer,* however, was decided four years before enactment of the FTAIA, and the court's holding was limited to the question of whether a foreign government qualified as a "person" under the Sherman Act. *Id.* at 320, 98 S.Ct. 584.[30] Statoil further maintains that *Caribbean Broadcasting,* 148 F.3d 1080, requires that jurisdiction be found over its claims. Initially, that case looks similar to today's case in that both the plaintiff and the defendant were foreign, and the defendant's international conspiracy had anticompetitive effects both inside and outside the United States. The critical difference, however, is that the effect on United States commerce in that case (that is, limiting to one radio station potential advertisers in the United States who wished to advertise in the Eastern Caribbean radio market) gave rise to the injury suffered by the plaintiff, a competing radio station--that is, exclusion of the plaintiff from the market for United States advertising dollars. *Id.* at 1082, 1086. As previously explained, that is simply not true with Statoil's claims.[31] Similarly, Statoil's reliance on *Nippon Paper,* 109 F.3d 1, is misplaced because the global conspiracy in that case had the domestic effect of raising fax paper prices in the United States, which gave rise to the government's claim under the antitrust laws. *Id.* at 2.

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[30] The dissent relies heavily upon *Pfizer* in asserting that Statoil's claim should be cognizable in United States federal court. The *Pfizer* court, however, did not analyze the requisite elements that must be present before a foreign entity can sue under the United States antitrust laws. Indeed, *Pfizer* 's narrow holding was "only that a foreign nation *otherwise entitled to sue in our courts* is entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff." *Id.* (emphasis added).

Simply put, Statoil has cited no case law to support an interpretation of Section 2 of the FTAIA different from the one we now adopt. This absence of such precedent, when considered with the plain language of the statute and evidence of congressional intent in enacting the FTAIA, reinforces our conclusion in this case.

VI

In sum, we find that the district court did not err when it dismissed Statoil's antitrust claims for lack of subject matter jurisdiction. Any reading of the FTAIA authorizing jurisdiction over Statoil's claims would open United States courts to global claims on a scale never intended by Congress. Without subject matter jurisdiction, United States federal courts are without power to entertain Statoil's claims.[32] The judgment of the district court is therefore

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[31] The dissent asserts that we "struggle" to reconcile *Caribbean Broadcasting* with our holding in the case before us. However, the court in *Caribbean Broadcasting,* for whatever reason, completely ignored Section 2 of the FTAIA in its analysis. Given that a decision in the case before us requires an interpretation of that provision, we find *Caribbean Broadcasting* unhelpful to any resolution of Statoil's claim. Indeed, we fail to understand how *Caribbean Broadcasting* provides any meaningful support for the dissent's interpretation of Section 2, given that the plaintiff's claim in that case arose from the anticompetitive effects on the domestic market for radio advertising in the Caribbean. *See* 148 F.3d at 1086.

AFFIRMED.

PATRICK E. HIGGINBOTHAM, Circuit Judge, dissenting:

I agree that this is not an easy case, but I have no hesitation in concluding that the Foreign Trade and Antitrust Improvements Act does not here divest the federal courts of jurisdiction and that the plaintiff has standing. With deference to my colleagues, I am persuaded by the plain text of section 6a, as well as its statutory context, legislative history, and purpose.

The claim is that defendants allocated the market for hundreds of millions of dollars of commerce--an allocation that placed United States markets at the mercy of monopoly charges in an industry vital to national security. The charged conspiracy was no foreign cabal whose secondary effects only lapped at United States shores. The impact of the conspiracy was direct and substantial. Indeed, the participation of American business in the market allocation scheme was critical to its success. The plaintiff here is a foreign company, true enough, but it was injured by the same acts of defendants that injured American plaintiffs whose right to seek recovery of their losses the district court recognized in this litigation.

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[32] As Statoil has no claim under the United States antitrust laws, we affirm the district court's finding that Statoil lacked standing to bring its claims. Based on *Associated Gen'l Contractors Inc. v. California State Council of Carpenters,* 459 U.S. 519, 535-45, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), the determination of Statoil's standing to bring its claims is dependent upon our finding of subject matter jurisdiction. Thus, in concluding that the FTAIA bars Statoil's claims against defendants under the Sherman Act, we have perforce found that Statoil's injury is not of the type that the antitrust statute was intended to forestall.

With the Foreign Trade and Antitrust Improvements Act, Congress set out to insulate United States business from its antitrust laws for certain business conducted outside the country. Its central purpose was to assist American business in competing abroad. This pass from antitrust restrictions did not extend to all conduct outside the United States. It stopped short of insulating conduct having direct and substantial effects upon American commerce and causing antitrust injury to that commerce sufficient to support a claim for treble damages.

I am not persuaded that when illegal conduct produces these domestic effects, that Congress intended to close the door to a foreign company injured by the same illegal conduct. That was not the law before this effort to assist American business abroad, and Congress did not intend to change it or do so unwittingly. I would reverse and remand for further proceedings.

I

A

Interpretation of a statute must begin with the text of the statute itself. Section 6a states in its entirety:

> Sections 1 to 7 of this title [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect--
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

[Proviso:] If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States. [1]

Section 6a(1) requires an effect on (A) domestic or import commerce of the United States or (B) the export commerce of a person in the United States.[2] Section 6a(2) requires that this effect "give[ ] rise to a claim under the provisions of sections 1 to 7 of this title, the Sherman Act, other than this section." The majority reads section 6a(2) to require that the effect "give[ ] rise to" ***the plaintiff's*** claim. It does not say that. It does say that the effect must "give[ ] rise to *a* claim."[3] In other words, the effect on United States commerce must be sufficient to support a claim, an injury of some person in a way cognizable under the Sherman Act.[4]

The literal text of the statute supports this conclusion. It reads, "gives rise to a claim." The word "a" has a simple and universally understood meaning. It is the indefinite article. There are many terms of art about which one can debate whether Congress uses the term as courts do, but this word is not one of them. If the drafters of the FTAIA had wished to say "the claim" instead of "a claim," they certainly would have.[5]

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[1] 15 U.S.C.A. § 6a (1997).

[2] For brevity, I herein refer to the effects required by section 6a(1) as effects on "United States commerce."

[3] 15 U.S.C. § 6a(2) (emphasis added).

[4] The effect must cause "antitrust injury." The "effect" described by section 6a(1) can be beneficial, neutral, or injurious. Section 6a(2) requires that this effect be injurious and, further, that the injury be caused by reduced, not increased, competition.

The reference to "a" claim makes clear that the "effect" described by section 6a(1) must violate the Sherman Act--that is, harm competition. Section 6a(1) requires that the conspiracy have an effect on United States commerce; section 6a(2) requires that this effect either monopolize commerce or restrain trade in the United States, thereby giving rise to a Sherman Act claim. Section 6a(2) removes jurisdiction over conspiracies whose effects on United States commerce are beneficial or benign, even if they restrain competition in other parts of the world. That an injury that "gives rise to" an antitrust claim must be an injury caused by harm to competition is no light notion. It is a well established and fundamental tenet of antitrust law.[6] Termed "antitrust injury," it is frequently encountered in enforcement action under the Clayton Act, by which Congress enlisted private enforcement in supplementation of governmental enforcement of the Sherman Act.[7]

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[5] Courts will not presume that statutory language is redundant or surplusage. The majority's interpretation, however, makes the proviso at the end of section 6a redundant. Section 6a(1)(B) states that the Sherman Act applies to conduct with effects on "export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States." The proviso limits the applicability of the Sherman Act under section 6a(1)(B) "to such conduct only for injury to export business in the United States ." Thus, while (1)(B) requires only that the conduct affect a person engaged in export trade in the United States, the proviso limits recovery under the Sherman Act to such persons. The majority's reading of 6a(2) renders this proviso redundant, since it requires that the effect on the exporter in the United States "give[ ] rise to" the plaintiff's claim--in other words, that the person engaged in export trade be the plaintiff.

[6] Courts have long held that private plaintiffs "must prove the existence of 'antitrust injury' " to recover under section 4 of the Clayton Act. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990). In *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), the Supreme Court noted that the plaintiffs "must show that the conspiracy caused them an injury for which the antitrust laws provide relief." *Id.* at 584 n. 7, 106 S.Ct. 1348. The Court explained that a "cognizable injury" is an "antitrust injury." *Id.* at 586, 106 S.Ct. 1348.

Thus, the literal text does not require that the effect on United States commerce give rise to the plaintiff's claim. At worst, the text is sufficiently ambiguous to allow for both the construction the majority offers and the construction I believe is correct. At the least, the majority cannot find support in a plain text argument.

Accepting that the text of the FTAIA compels neither the majority's reading or mine, we must enlist other aids in determining the meaning of the statute. In doing so, I conclude that the textual conclusion that "a" means "a" is supported by the statutory context of the FTAIA, which describes the function of the FTAIA and its animating purpose, and by the purposes of the antitrust laws in general; by the legislative history of the FTAIA; and by the sparse case law that interprets the FTAIA.

B

The FTAIA was enacted as Title IV of Public Law 97-290, entitled "Export Trading Company Act of 1982."[8] Title I contains the congressional findings. Every single congressional finding relates to the importance of export business and the need to encourage export activity by American business.[9] The statute then states: "It is the purpose of this Act to increase United States exports of products and services by encouraging more efficient provision of export trade services to United States producers and suppliers, in particular by ... modifying the application of the antitrust laws to certain export trade."[10] It could not be clearer that the FTAIA serves to exempt exporting from antitrust scrutiny, not to limit the liability of participants in transnational conspiracies that affect United States commerce. [11]

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[7] The Clayton Act requires that *the plaintiff* suffer antitrust injury. The FTAIA, by contrast, requires that the United States suffer antitrust injury. *Compare* Clayton Act, 15 U.S.C.A. § 15(a) (providing cause of action to anyone "injured in *his* business or property by reason of anything forbidden in the antitrust laws") (emphasis added), *with* FTAIA, 15 U.S.C.A. § 6a(2) ("gives rise to *a* claim under the [Sherman Act]") (emphasis added). When a private plaintiff wishes to sue under the Clayton Act, the Clayton Act and FTAIA erect complementary requirements: the plaintiff must suffer antitrust injury, and persons in United States commerce must suffer antitrust injury. The majority opinion, on the other hand, appears to conflate these two concepts.

[8] Export Trading Company Act of 1982, Pub.L. No. 97-290, 96 Stat. 1233 (codified in scattered sections of 15 U.S.C.).

The text of the FTAIA implements this purpose perfectly. The Sherman Act, prior to the enactment of the FTAIA, applied to conduct that affected domestic, ~~import,~~ and export commerce. Recall that section 6a(1) limiting the reach of the

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[9] Export Trading Company Act of 1982 § 102, 96 Stat. at 1233-34.

[10] § 102(b), 96 Stat. at 1234. The Third Circuit has recently cited this language in concluding that "Congress enacted the FTAIA for the purpose of facilitating the export of domestic goods by exempting export transactions that did not injure the United States economy from the Sherman Act and thereby relieving exporters from a competitive disadvantage in foreign trade." *Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62, 71 (3d Cir.2000).

[11] Because the language of the statute is clear, we need not resort to its legislative history to discern its purpose. In any case, the legislative history only reiterates this single, motivating purpose. *See* H.R.Rep. No. 97-686, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.C.C.A.N. 2487, 2487 (describing the legislation as "the bill . . . to exclude from the application of [the antitrust laws] certain conduct involving exports" and "one of several bills ... that seek to promote American exports"). The excerpt of legislative history upon which the majority relies, that the purpose of the law is "to more clearly establish when antitrust liability attaches to international business activities," is certainly a true statement, but it expresses the purpose of the law at a level of generality that offers us no guidance on the narrow question we face. What the majority has overlooked is that Congress has spoken with much more particularity as to the purpose of this law: the purpose of the FTAIA is to promote exports by exempting American exporting activity from the antitrust laws.

Sherman Act applies to conduct that affects (1) domestic commerce; (2) import commerce; or (3) export commerce, but only to the extent that American exporters are affected. One class of conduct is excluded: conduct that affects only foreign purchasers of American exports. This is the function of the FTAIA: to protect American exporters who monopolize or conspire to restrain export trade that does not harm United States commerce.

The purpose of the FTAIA offers no support for the majority's reading of the statute. It is undisputed that if proved, the conspiracy in this case would have direct, substantial, and reasonably foreseeable effects upon United States commerce. No American exporters are implicated by this suit. American exporting business can only be harmed by the alleged conspiracy in this case.

Indeed, interpreting the FTAIA as the majority wishes will impair the competitiveness of American exporters. Under the majority's view, an American cartel that fixes prices worldwide will be subject to Clayton Act suits by plaintiffs from around the world,[12] but a foreign cartel that fixes prices worldwide will be subject to suit under the Clayton Act only from plaintiffs injured in American commerce. This interpretation of the FTAIA transforms a safe harbor for American exporters into a boon for foreign cartels that restrain commerce in the United States.

With respect to my colleagues, I fear that their reading of the FTAIA will hinder its purposes and reduce the effectiveness of the antitrust laws. Nothing in the text of the FTAIA, or the Export Trading Company Act of 1982 as a whole, or its legislative history, casts doubt on the importance of deterring restraints of trade that affect United States commerce. The Supreme Court has repeatedly recognized that the accent of the Sherman and the Clayton Acts is deterrence, requiring violators to pay full, treble damages, even if some plaintiffs gain a windfall or are foreigners. For example, in *Illinois Brick Co. v. Illinois,*[13] the Supreme Court noted the importance of "vigorous private enforcement of the antitrust laws" and "deterring violators" and recognized that "from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as some one redresses the violation."[14]

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[12] This cannot seriously be disputed. The FTAIA does not alter the holding of *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978), which allowed foreign governments to sue an American cartel that charged supra-competitive prices for pharmaceuticals worldwide. The legislative history approves of *Pfizer*. *See* H.R.Rep. No. 97-686, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2495.

The Supreme Court in *Pfizer, Inc. v. Government of India*[15] addressed a situation somewhat analogous to this case. The government of India sued several American pharmaceutical manufacturers under the Clayton Act for damages caused by a price-fixing conspiracy. Like Statoil, the government of India alleged a worldwide conspiracy that raised prices in the United States and abroad. Unlike in this case, in *Pfizer* the sales were made in the United States.[16] In holding that foreign governments could recover under the Clayton Act, Justice Stewart observed: "Treble-damage suits by foreigners who have been victimized by antitrust violations clearly may contribute to the protection of American consumers.... [A]n exclusion of all foreign plaintiffs would lessen the deterrent effect of treble damages."[17]

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[13] 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977).

[14] *Id.* at 745-46, 97 S.Ct. 2061, *quoting id.* at 760, 97 S.Ct. 2061 (Brennan, J., dissenting).

[15] 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978).

[16] Because of this, *Pfizer* is distinguishable from this case, since one can argue, as the majority does, that the injury to the foreign plaintiff occurred in the United States. But there is nothing in the reasoning of *Pfizer* that suggests that the facts of *Pfizer* define the outer limit of the antitrust laws. Further, even if we assume that the plaintiffs in *Pfizer* were injured in the United States, they were injured as buyers in an export transaction from the United States. Under section 6a(1)(B) and the majority's reading of the section 6a(2), injuries to buyers of American exports do not create jurisdiction under the antitrust laws. Yet the legislative history of the FTAIA cites *Pfizer* with approval. *Pfizer* maintains its force after the FTAIA because the conspiracy in *Pfizer* also affected Americans in domestic commerce. This is why section 6a(2) states "gives rise to a claim" and not "gives rise to the plaintiff's claim."

The logic underlying this conclusion is straightforward. Conspirators facing antitrust liability only to plaintiffs injured by their conspiracy's effects on the United States may not be deterred from restraining trade in the United States. A worldwide price-fixing scheme could sustain monopoly prices in the United States even in the face of such liability if it could cross-subsidize its American operations with profits from abroad. Unless persons injured by the conspiracy's effects on foreign commerce could also bring antitrust suits against the conspiracy, the conspiracy could remain profitable and undeterred.

It is no rejoinder that conspirators would simply choose to exclude the United States from any price-fixing conspiracy as long as American plaintiffs could sue. In at least some cases, including the United States in a price-fixing conspiracy is necessary to generate monopoly profits. Otherwise, arbitrage would rapidly equalize unequal prices around the globe as speculators resold goods purchased in the United States to buyers in high-price regions.[18] Thus, a cartel may find it impossible to fix prices anywhere without a worldwide conspiracy. The Sherman Act can only deter these violations if it protects all parties injured by such a conspiracy.

Justice Stewart succinctly made this argument in *Pfizer:*

The conspiracy . . . operated domestically as well as internationally. If foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home. If, on the other hand, potential antitrust violators must take into account the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators.[19]

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[17] *Id.* at 314-15, 98 S.Ct. 584.

[18] For a real-life example of an arbitrage attempt, see *Eurim-Pharm GmbH v. Pfizer, Inc.*, 593 F.Supp. 1102, 1104 (S.D.N.Y.1984) (describing how antitrust plaintiff attempted to arbitrage pharmaceuticals by repackaging drugs purchased in England for sale in Germany).

C

The legislative history also supports this reading of the statute and undermines the majority's interpretation of section 6a(2). The Committee Report on the House bill that became the FTAIA states that the FTAIA

> does not exclude all persons injured abroad from recovering under the antitrust laws of the United States. A course of conduct in the United States--*e.g.*, price fixing not limited to the export market--would affect all purchasers of the target domestic products or services, whether the purchaser is foreign or domestic. The *conduct* has the requisite effects in the United States, even if some purchasers take title abroad or suffer economic injury abroad.[20]

This statement explicitly refers to plaintiffs who "suffer economic injury abroad." The majority's interpretation of the statute is contrary to this statement in the legislative history. The "effect" on United States commerce is the injury suffered by purchasers in the United States; this effect does not give rise to the injury suffered by the foreign plaintiffs. Yet the legislative history contemplates such plaintiffs recovering under the Sherman Act. The scenario described in this statement is virtually identical to the instant case: a conspiracy sells to buyers in the United States and abroad, and each of the buyers is injured. All are injured by the same conspiracy, and it is a conspiracy that has been injurious to competition in the United States.

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[19] 434 U.S. at 315, 98 S.Ct. 584 (footnote omitted).

[20] H.R.Rep. No. 97-686, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.C.C.A.N. 2487, 2495 (emphasis in original), *citing Pfizer, Inc. v. Government of India*, 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978).

The majority, however, chooses to rely on the following statement in the same House Report:

> A transaction between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws.... It is thus clear that wholly foreign transactions as well as export transactions are covered by the [FTAIA], but that import transactions are not.[21]

That American ownership alone should not create jurisdiction over a wholly foreign conspiracy is not controverted, controversial, or relevant to this case. What is relevant is that the language omitted from the quotation above states that if a conspiracy between two foreign firms, regardless of American ownership, does have an effect on domestic commerce, there is jurisdiction.[22]

D

I recognize that there is little precedent to guide our analysis of this question. Of the case law that does exist, there are no appellate court cases supporting the majority's holding. To the contrary, the majority must reconcile or distinguish the only other circuit court decisions interpreting the FTAIA, because all of them find jurisdiction present.

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[21] *Id.* at 2494-95.

[22] *Id.* ("Such foreign transactions should, for the purposes of this legislation, be treated in the same manner as export transactions-- that is, there should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor.").

The majority opinion struggles, and I believe fails, to reconcile *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC,*[23] which involved a foreign plaintiff alleging monopolization in radio advertising in the Caribbean by a competing radio station. The defendant was also a foreign entity. Consistent with the reasoning of this dissent, the D.C. Circuit held that the FTAIA did not preclude jurisdiction, because the plaintiff showed that the foreign defendants' conduct had the effect of harming United States purchasers of advertising. It stated: "the alleged injury is to advertisers in the United States."[24] Thus, based on the injury to advertisers in the United States, the court found jurisdiction over a suit by a radio broadcaster in the Caribbean. The D.C. Circuit did not require that the injury to American advertisers "give[ ] rise to" the plaintiff's cause of action; its determination that the injury gave rise to "a" claim was sufficient.

E

Finally, the majority's attempt to enlist the aid of the Commerce Clause and the canon of construction that creates a presumption against extraterritoriality is mistaken.

The majority suggests that the interpretation of the FTAIA that I espouse is beyond the power of Congress to regulate commerce.[25] The Supreme Court itself has recognized--in the context of the Sherman Act--that Congress has intended to regulate, and constitutionally has regulated, foreign conduct that affects United States commerce.[26] And it has been decades since any court has taken so cramped a view of the Commerce Clause in any context.[27]

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[23] 148 F.3d 1080 (D.C.Cir.1998).

[24] *Id.* at 1086.

[25] *See* Majority Op. at 426 n.18.

[26] *Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 796, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993) ("[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.").

The majority is correct to note that the courts' historical willingness to apply the Sherman Act extraterritorially is not dispositive of this appeal, since the FTAIA, and not the courts' earlier interpretations of the Sherman Act, is controlling here.[28] But precisely because the FTAIA applies here, the majority's reliance on the canon against extraterritorial application of statutes is misplaced. This canon operates when Congress has not clearly spoken on the issue of extraterritoriality.[29] The FTAIA, however, explicitly addresses nothing other than extraterritoriality. We must be careful not to use such a canon when Congress is speaking directly to the relevant issue. Make no mistake: such canons reflect substantive presumptions about the content of laws. If courts apply substantive canons of construction against statutes that do speak to an issue, then it is the courts, not Congress, who are making the policy choices that form the content of legislation.[30]

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[27] *See, e.g., United States v. Lopez*, 514 U.S. 549, 552-59, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (recounting the development of Commerce Clause jurisprudence in the domestic context).

[28] *See* Majority Op. at 423-24.

[29] *See E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) ("This 'canon of construction ... is a valid approach whereby unexpressed congressional intent may be ascertained .' ... In applying this rule of construction, we look to see whether 'language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage [extraterritorially].'").

[30] In any case, when Congress enacted the FTAIA, is was legislating against a backdrop of extraterritorial application of the Sherman Act; thus we cannot presume that Congress treated non-extraterritoriality as the default condition. *See Hartford Fire Ins.*, 509 U.S. at 796, 113 S.Ct. 2891 ("[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States ."); *id.* at 814, 113 S.Ct. 2891 (Scalia, J., dissenting) ("[I]t is now well established that the Sherman Act

II

Because I disagree with the majority's interpretation of the FTAIA, I would reach the standing inquiry. It is straightforward; this court has restated the test for standing under the Clayton Act as "1) injury-in-fact, an injury to the plaintiff proximately caused by the defendants' conduct; 2) antitrust injury; and 3) proper plaintiff status, which assures that other parties are not better situated to bring suit."[31]

Statoil has standing. First, it has suffered injury-in-fact. It paid inflated prices directly to the defendants.

Second, Statoil has suffered antitrust injury. Antitrust injury requires that the injury to the plaintiff not merely show "injury causally linked to an illegal presence in the market" but injury "attributable to an anti-competitive aspect of the practice under scrutiny."[32] This element of standing excludes plaintiffs, primarily competitors, harmed by increased, rather than decreased, competition.[33] Statoil's injury was the direct

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applies extraterritorially."); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n. 6, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962).

[31] *Doctor's Hospital of Jefferson, Inc. v. Southeast Medical Alliance, Inc.*, 123 F.3d 301, 305 (5th Cir.1997). For further discussion, see *McCormack v. NCAA*, 845 F.2d 1338, 1341 (5th Cir.1988); *see also Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977).

[32] *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990), *quoting Brunswick*, 429 U.S. at 489, 97 S.Ct. 690.

[33] *See Atlantic Richfield*, 495 U.S. at 334, 337-38, 110 S.Ct. 1884; *Brunswick*, 429 U.S. at 488-89, 97 S.Ct. 690.

result of the alleged price-fixing conspiracy and consequent restraint of trade.[34]

Third and finally, Statoil is a proper plaintiff. In determining whether a party is a proper plaintiff, it should examine "such factors as (1) whether the plaintiff's injuries or their causal link to the defendant are speculative, (2) whether other parties have been more directly harmed, and (3) whether allowing this plaintiff to sue would risk multiple lawsuits, duplicative recoveries, or complex damage apportionment."[35]

First, neither Statoil's injuries, nor their connection to the defendants, is speculative. The injuries arise from the defendants charging Statoil monopoly prices. Second, other parties have not been harmed more directly than Statoil. Statoil was a purchaser in the market for heavy-lift barge services, the market in which the defendants fixed prices. Third, allowing Statoil to sue would not risk duplicative recoveries or the like. There is no suggestion that any unnamed party can seek to recover for the same damages Statoil suffered.

III

The antitrust laws have always given federal courts jurisdiction over conspiracies that adversely affect competition in the United States. The FTAIA limits that jurisdiction; but it does so by exempting American export conspiracies, not foreign conspiracies that injure American competition.

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[34] Appellees rely heavily on the antitrust injury requirement in arguing that Statoil lacks standing. Their argument that Statoil's injury was not caused by high prices charged to U.S. consumers misconstrues the antitrust injury requirement. Antitrust injury does not limit standing to U.S. consumers but to anti-competitive injuries. *See Doctor's Hospital*, 123 F.3d at 305-06; *see also Blue Shield of Virginia v. McCready*, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982).

[35] *McCormack*, 845 F.2d at 1341.

The majority opinion expresses concern that foreign litigants will flock to the United States for redress of their injuries in distant lands. The majority opinion, and the district court opinions it cites, seem to fear that the interpretation of the FTAIA that Statoil advocates makes the Sherman Act an antitrust regulation of foreign economies throughout the entire world, a paternalistic lawmaking enterprise that ignores the adequacy of foreign tribunals. But Congress has enacted no such thing. Congress enacted the FTAIA to serve the United States' narrow interest in vigorous domestic competition.

The text of the FTAIA may be inelegant, but it serves the selfish national interests of the United States: the FTAIA excludes from antitrust liability all conduct that has caused no antitrust injury to the United States economy;[36] but it enlists all injured parties--foreign or domestic--to assist the Department of Justice in deterring conduct that does harm the forces of competition in the United States. When a conspiracy causes a direct and substantial injury to competition in the United States, the Clayton Act recruits private parties to supplement the efforts of the Department of Justice in ending the conspiracy. The FTAIA ensures that parties injured by foreign aspects of the same conspiracy that harms American commerce are part of the phalanx of enforcers brought to bear by the Clayton Act. Thus, treble damages suits by parties who suffer antitrust injury from a conspiracy that has a direct and substantial harmful impact on United States commerce serve a single function: the protection of United States commerce. The FTAIA threatens no parade of horribles--it does nothing more than zealously protect competition in the United States while sparing from the docket of American courts suits involving conspiracies that affect only foreign economies.

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[36] Indeed, the fact that the FTAIA protects American exporters from antitrust liability for conduct that restrains export trade indicates that the FTAIA is not concerned with regulating foreign economies.

In sum, I believe the FTAIA does not divest the federal courts of jurisdiction over suits by plaintiffs who suffer antitrust injuries from a conspiracy that also harms competition in United States commerce. Whether the harm felt in the United States is the source of the injury to the plaintiff is irrelevant; it is the effects on the United States that creates jurisdiction. Under the facts of this case, I would conclude that the district court had jurisdiction over the suit and that Statoil had standing to sue the defendants under the Clayton Act. I respectfully dissent.

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 6a. Conduct involving trade or commerce with foreign nations

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless –

(1) such conduct has a direct, substantial, and reasonably foreseeable effect –

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. § 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting a forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only –

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumentalities of foreign states

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection

(a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if –

(A) such foreign state would be denied, under section 1605(a)(2) of Title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) Definitions

For purposes of this section –

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of Title 28, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of Title 28.

Supreme Court, U.S.
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No. 00-1842

IN THE

Supreme Court of the United States

STATOIL ASA,

Petitioner,

v.

HEEREMAC V.O.F., *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

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14 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
REPLY BRIEF FOR THE PETITIONER 1
I. This Case Presents an Important and Unresolved Question of Federal Law Meriting Prompt Review. 1
II. The Substantial Confusion Surrounding the Question Presented Further Justifies this Court's Intervention. 5
III. The Fifth Circuit's Ruling Is Wrong on the Merits. 6
CONCLUSION 10

TABLE OF AUTHORITIES

Cases

'In' Porters, S.A. v. *Hanes Printables*, 663 F. Supp. 494 (M.D.N.C. 1987) 5

Atlantic Richfield Co. v. *USA Petroleum Co.*, 495 U.S. 328 (1990) 9

Blue Shield of Va. v. *McCready*, 457 U.S. 465 (1982) 9

Braxton v. *United States*, 500 U.S. 344 (1991) 3

Caribbean Broadcasting System v. *Cable & Wireless PLC*, 148 F.3d 1080 (CADC 1998) 5

Empagran S.A. v. *F. Hoffman-La Roche, Ltd.*, No. 00-1686, 2001 WL 761360 (D.D.C. June 7, 2001) 4

Ferromin Int'l Trade Corp. v. *UCAR Int'l*, C.A. No. 99-693 (E.D. Pa. June 13, 2001) 4

Hartford Fire Insurance Co. v. *California*, 509 U.S. 764 (1993) 6, 8

Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977) 9

In re Cooper Antitrust Litig. (*Metallgesellschaft AG* v. *Sumitomo Corp.*), 117 F. Supp. 2d 875 (W.D. Wis. 2000) 4, 5

In re Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702 (D. Md. 2001) 5

Kruman v. *Christie's Int'l PLC*, 129 F. Supp. 2d 620 (S.D.N.Y. 2001) 4

Laker Airways v. *Sabena*, 731 F.2d 909 (CADC 1984) 6

Lantec, Inc. v. *Novell, Inc.*, No. 2:95-CV-97-ST, 2000 U.S. Dist. LEXIS 19905 (D. Utah Sept. 15, 2000) 4

Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) 7

Pfizer, Inc. v. *Government of India*, 434 U.S. 308 (1978) 1, 9

Transnor (Bermuda) Ltd. v. *BP North Am. Petroleum*, 738 F. Supp. 1472 (S.D.N.Y. 1990) 9

United Phosphorus, Ltd. v. *Angus Chemical Co.*, 131 F. Supp. 2d 1003 (N.D. Ill. 2001) 4, 5

Statutes

15 U.S.C. § 6a 1, 5, 6
15 U.S.C. § 7 9
15 U.S.C. § 12(a) 9
15 U.S.C. § 15(a) 9

Other Authorities

U.S. Dep't of Justice, Antitrust Div., International Competition Pol'y Advisory Comm., *Final Report to the Attorney General and Assistant Attorney General for Antitrust* 277 (Feb. 2000) 3
U.S. Sentencing Guidelines Manual § 2R1.1 3

REPLY BRIEF FOR THE PETITIONER

In their Briefs in Opposition, respondents make three principal arguments. First, they contend that certiorari should not be granted because the Fifth Circuit's decision does not present a true "conflict" with the decisions cited by Statoil. Second, they argue that a finding of jurisdiction would be "breathtaking in scope," opening U.S. courts to a flood of foreign claims. Finally, they argue that the Fifth Circuit's decision is correct on the merits and thus is unworthy of Supreme Court attention. Respondents are mistaken on each of these points. Most significantly, they provide little or no response to Statoil's principal assertion: that the question presented is one of profound importance to U.S. antitrust enforcement and one that requires prompt and authoritative resolution.

I. This Case Presents an Important and Unresolved Question of Federal Law Meriting Prompt Review.

Respondents do not seriously dispute that this case presents an unresolved question of federal law with manifest importance for the application of the federal antitrust laws and thus the American economy. Respondents furthermore do not contest that this Court has repeatedly granted certiorari to resolve similar questions even in the absence of the disarray in the lower courts that is present in this case. See Pet. 16 n.4.

The Petition established that the Fifth Circuit's construction of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), 15 U.S.C. § 6a, would substantially narrow the Sherman Act's applicability to anticompetitive conduct that harms the U.S. economy. The FTAIA reflects Congress' view that jurisdiction under the Sherman Act should *not* be limited artificially to claims arising directly from effects in the United States. As this Court explained in *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308, 315 (1978), in a discussion subsequently embraced by the Committee that framed the statute, see Pet. 17-18, when "potential antitrust violators must take into account the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators."

Far from contesting this point, respondents embrace it, albeit through their conclusory assertion that any result other than that reached below would turn the federal courts into the fora for resolving all competition claims around the world. That assertion is plainly incorrect, for the scope of the antitrust laws is limited to conduct that has a direct, substantial, and reasonably foreseeable anticompetitive effect in the United States. Conspiracies that harm foreign purchasers will meet this statutory test only when there is a unified conspiracy affecting a world-wide or regional market that encompasses the United States (rather than multiple conspiracies separately affecting distinct local or national markets). Where jurisdiction is present under this test, claims for injury suffered abroad can and generally will be consolidated with similar claims by U.S. victims of the conspiracy, with little or no additional burden on U.S. courts.

As the Petition explained, and respondents do not dispute, this case involves just such a conspiracy by respondents. Petitioner's claims arise from the integrated, world-wide market for the services of a very small number of barges. Respondents' conspiracy involved the agreement of the Saipem respondents to withdraw their ship from projects in U.S. waters as the *quid pro quo* for other producers' agreement to allocate to Saipem a high proportion of contracts at supra-competitive prices in the North Sea. Respondents' conduct thus had a direct, substantial, and foreseeable effect on U.S. commerce that was inextricably linked to the injury suffered by U.S. purchasers. Acknowledging jurisdiction on these facts will not open the federal courts to antitrust claims world-wide.

Respondents' further suggestion that such claims should be left to foreign competition laws was not embraced by Congress, and the better view is that comprehensive application of U.S. antitrust law *encourages* the development of international antitrust regimes. See Pet. 21 n.16. It is monumentally inefficient to split identical antitrust claims arising from the same anticompetitive conduct in the same world-wide market into separate actions in multiple jurisdictions – here, courts in the United States, nations bordering the North Sea, and various Asian nations. Such fragmentation of claims serves no purpose other than to make it more difficult and expensive to pursue the remedies necessary to deter anticompetitive conduct and thereby protect the U.S. economy.

Respondents also essentially ignore that the decision below further undermines the antitrust laws by limiting the scope of *governmental* enforcement. McDermott's assertion (at 18) that the government may still "consider a defendant's worldwide sales in determining the seriousness of the defendant's role" is at the least highly doubtful under the language of the applicable Sentencing Guideline, which encompasses only "goods or services affected by the *violation*." U.S. Sentencing Guidelines Manual § 2R1.1(b)(2) (emphasis added). There cannot be any reasonable dispute that the government has a substantial stake in the proper disposition of the question presented. See generally Pet. 20-21 (describing numerous ongoing grand juries investigating international cartels); cf. U.S. Dep't of Justice, Antitrust Div., International Competition Pol'y Advisory Comm., *Final Report to the Attorney General and Assistant Attorney General for Antitrust* 277 (Feb. 2000) (recommending "that federal, state, and local judges hearing private disputes that raise claims or defenses based on considerations of governmental policy invite concerned governments, including the U.S. Department of Justice, to submit their views at an early stage in the litigation").[1]

Respondents' oblique suggestion that the proper construction of Section 2 of the FTAIA should be resolved in another case that eventually will be presented to this Court is flawed as well. The FTAIA was adopted in 1982, yet the issue raised by the Petition remains mired in confusion. Given that the question presented turns on the meaning of at most two words – "a" and "conduct" – leaving the issue to percolate further in the lower courts would only cause the confusion to fester, while permitting respondents to escape substantial liability for what at least one of them has admitted in a guilty plea was anticompetitive conduct that harmed purchasers in the United States and abroad. Moreover, unlike this case, the other potential vehicles identified by respondents suffer from flaws that make it relatively unlikely that the Court would find it necessary to reach the proper construction of Section 2. In particular, none present so clearly as this case a unified, world-wide market that has been affected by a single conspiracy. And none present a situation in which the injury to domestic purchasers was inextricably linked to – and indeed was a *quid pro quo* for – the identical injury suffered by purchasers abroad.[2]

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[1] The federal government's ability to contest the Fifth Circuit's construction of the FTAIA in a criminal proceeding is questionable in light of this Court's general practice of not addressing disputes over the application of the Sentencing Guidelines. *Braxton* v. *United States*, 500 U.S. 344 (1991).

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[2] The cases cited by respondents generally involve claims arising in a distinct foreign market or conduct that did not have an effect on U.S. commerce. See *United Phosphorus, Ltd.* v. *Angus Chem. Co.*, 131 F. Supp. 2d 1003, 1009 (N.D. Ill. 2001) (dispute over alleged anticompetitive scheme to prevent the manufacturing and sale of drugs in India; "the alleged conduct underlying Plaintiffs' claims can have had no effect on any United States commerce in the chemicals that Plaintiffs state they would have manufactured"); *Kruman* v. *Christie's Int'l PLC*, 129 F. Supp. 2d 620, 625-26 (S.D.N.Y. 2001) (dispute over individual sales of art overseas; "it would be appropriate for the United States to provide remedies for injuries suffered in consequence of overt acts that occurred outside this country only if those acts, either individually or perhaps collectively, had direct, substantial and reasonably foreseeable effects here that caused the injuries to be remedied. That did not occur in this case."); *In re Copper Antitrust Litig.* (*Metallgesellschaft AG* v. *Sumitomo Corp.*), 117 F. Supp. 2d 875, 882, 886 (W.D. Wis. 2000) (*all* copper transactions alleged by plaintiffs occurred on London Metals Exchange and American markets were affected "only secondarily," such that "plaintiffs challenge conduct that involves trade or commerce on the LME, a *foreign* market" (emphasis added); "the antitrust laws do not apply to an action by a person injured overseas because of price-fixing in a *foreign* market even if the same defendants engage in price-fixing affecting an *American* market" (emphasis added)); *Lantec, Inc.* v. *Novell, Inc.*, No. 2:95-CV-97-ST, 2000 U.S. Dist. LEXIS 19905, at *14 (D. Utah Sept. 15, 2000) (plaintiffs' complaint "does not allege such an effect on domestic commerce, or facts from which such an effect on domestic commerce are shown"); *Empagran S.A.* v. *F. Hoffman-La Roche, Ltd.*, No. 00-1686, 2001 WL 761360, at *6 (D.D.C. June 7, 2001) (plaintiffs alleged a "worldwide *conspiracy*" in sale of vitamins, but did not allege existence of single, unified *market* for sales, which occurred in numerous countries (emphasis added)); *Ferromin Int'l Trade Corp.* v. *UCAR Int'l*, C.A. No. 99-693, Slip op. at 11 (E.D. Pa. June 13, 2001) (in antitrust complaint arising from sale of graphite electrodes, declining to permit "claims for damages suffered by foreign companies solely because of decreased competition and higher prices in *foreign markets*" (emphasis added)).

II. The Substantial Confusion Surrounding the Question Presented Further Justifies this Court's Intervention.

Although even the majority below acknowledged the substantial confusion that has long surrounded the international application of the Sherman Act, see Pet. 6, respondents deny it. Their attempt to distinguish the case law cited in the Petition, however, takes too narrow a view of the type of "conflict" that will justify review in this Court. It is the legal propositions adopted by other courts – not the facts of the individual cases on their most narrow construction – that matter. Congress enacted the FTAIA, first and foremost, to guide businesses' primary conduct. Importers and exporters reading the lower courts' varying constructions of Section 2 are subject to substantial uncertainty about what the statute means and the conduct in which they may lawfully engage. Even respondents (McDermott at 6; Saipem at 20) emphasize that Congress enacted the FTAIA precisely to promote clarity and certainty regarding the extraterritorial application of the Sherman Act.[3]

Respondents seek to distinguish the D.C. Circuit's decision in *Caribbean Broadcasting System* v. *Cable & Wireless PLC*, 148 F.3d 1080 (CADC 1998), on the ground that the plaintiff in that case had some customers in the United States. But the D.C. Circuit did not rely on that fact in holding that federal courts had jurisdiction over plaintiff's complaint under the FTAIA. Moreover, respondents (Saipem at 11-12) are simply wrong in denying that "*Caribbean* permitted the plaintiff to pursue *all* of its claims for damages," for that is precisely what the court did. The court of appeals held that the plaintiff's attempt to recover for damages arising out of lost sales to all customers in the Caribbean satisfied the FTAIA notwithstanding that most of its customers were located, and virtually all of defendants' exclusionary conduct took place, outside the U.S. See 148 F.3d at 1086 (court explains that market subject to petitioner's complaint was the Eastern Caribbean, only part of which is within U.S. jurisdiction). As the district court explained, the plaintiff's allegations reflected a "*de minimis*" connection to U.S. commerce. Pet. 24. *Caribbean* is irreconcilable with the Fifth Circuit's holding that a plaintiff may recover only for those injuries arising directly from U.S. commerce.[4]

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[3] Respondents are not correct in describing the application of Section 2 by district courts as uniform and clear. For example, the district court in *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702 (D. Md. 2001), rejected the tests applied by two other district courts. *Id.* at 716 (declining to follow *'In' Porters, S.A.* v. *Hanes Printables*, 663 F. Supp. 494 (M.D.N.C. 1987), as too restrictive, and *In re Cooper Antitrust Litig.*, 117 F. Supp. 2d 875 (W.D. Wis. 2000), as too permissive of jurisdiction). In other respects, respondents mischaracterize the district court holdings they cite. The *Microsoft* opinion, for example, ultimately rested on antitrust standing, not Section 2. And the court's statement in *United Phosphorus* that "a foreign company cannot demonstrate the domestic injury requirement by 'piggy-backing' onto the injury of a United States exporter," was expressly limited to the FTAIA's proviso, which unlike Section 2 is limited to "injury to export business in the United States." See 131 F. Supp. 2d at 1008, 1019 (citation omitted).

Other courts of appeals, echoing this Court's decision in *Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764, 795-96 (1993), have continued to apply the "well established" rule that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." Those courts read the FTAIA to require simply that the effect on U.S. commerce be anticompetitive. See Pet. 28. The Fifth Circuit's much more cabined view of Section 2 creates substantial uncertainty regarding whether particular activities fall within the prohibitions of the Sherman Act.

III. The Fifth Circuit's Ruling Is Wrong on the Merits.

Respondents address the merits, essentially arguing that there is no need for the Court to grant certiorari because the case was correctly decided under the FTAIA. Their arguments fail to address the basic structure, language, and legislative history of the statute. As Statoil demonstrated in its Petition, Section 1 of the FTAIA established jurisdiction in all cases in which the defendants' *conduct* has a direct, substantial, and reasonably foreseeable effect on U.S. commerce. The unlawful conduct that had such effect is not, as respondents would have it, specific transactions in either the North Sea or the Gulf of Mexico. Rather, the conduct, as alleged in Statoil's complaint, was respondents' unified conspiracy to allocate and fix prices in a single world-wide market for heavy lift services. Even the court below acknowledged that this conduct had the requisite effect in the United States (Pet. App. 13a; see also *id.* 5a-6a), and this conduct is indisputably subject to the U.S. antitrust laws. Indeed, this conspiracy has resulted in a criminal antitrust conviction of one of the respondents.

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[4] The Fifth Circuit's position furthermore rests on the view that the FTAIA for the first time imposed a requirement under the Sherman Act that the plaintiffs' injury arise from an effect in U.S. commerce. But respondents have no answer to the fact that the D.C. Circuit, by contrast, recognized in *Laker Airways* v. *Sabena*, 731 F.2d 909, 946 n.137 (CADC 1984), that the FTAIA "did not change . . . the application of antitrust laws to conduct producing the requisite effect in the United States territory."

The sole remaining question under the FTAIA is whether Section 2 precludes jurisdiction over claims of particular plaintiffs arising from respondents' unlawful conspiracy. It does not. Section 2's requirement that the domestic effect of the conduct must give rise to "a claim" under the antitrust laws reflects Congress' manifest purpose, recorded in the legislative history, to preclude jurisdiction when the effects felt in this country are not anticompetitive.[5] Thus, Section 2 does not impair in any way the ability of foreign parties to recover for anticompetitive conduct that also harmed U.S. consumers. Indeed, the legislative history, as quoted in all parties' papers in this action, demonstrates congressional concern that the U.S. antitrust laws should broadly provide a remedy to all those injured by conduct that has the requisite adverse effect in this country so as to assure adequate deterrence and protect U.S. consumers. The proviso at the end of the FTAIA reflects this concern, by limiting foreign antitrust claims arising out of exports, but doing so solely in those cases in which the "only" effect in this country is on export commerce – *i.e.*, when the conduct has no effect on U.S. domestic or import commerce.

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[5] Such was the case, for example, in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986). There, a conspiracy to fix prices in Japan may have had the effect of causing Japanese producers to charge lower prices in the U.S. as a means of disposing of excess output. Despite this (benign) effect in the U.S., American competitors could not recover in the absence of a showing of anticompetitive effect in the U.S.

Respondents also suggest two alternative grounds on which, they assert, the judgment below might be supported. They are mistaken in each regard. First, respondents argue that the Sherman Act itself, apart from the FTAIA, limits jurisdiction because it applies only to commerce "with foreign nations" and not to commerce between or among foreign nations. See Saipem at 14-15. Respondents characterize Statoil's claim as one for unlawful charging of high prices on particular transactions in the North Sea, and they argue that the Sherman Act provides no underlying jurisdiction because the commerce involved is between foreign nations.

This reasoning is wrong for the same reason that respondents' analysis of the FTAIA is wrong. The Sherman Act outlaws *conduct* – specifically "[e]very contract, combination . . . , or conspiracy" that restrains U.S. domestic commerce or commerce with foreign nations.[6] Here, it is clear that respondents' unlawful conspiracy had the requisite effect on U.S. domestic commerce in the Gulf of Mexico, and the Sherman Act by its terms thus clearly applies to outlaw this conduct.

Alternatively, respondents argue (Saipem at 28-29) that Statoil and other foreign purchasers lack standing to assert their claims. This argument too is wrong and was effectively rebutted by Judge Higginbotham in his dissent, without contradiction by the majority. See Pet. App. 35a-36a.[7]

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[6] In *Hartford Fire*, the Court similarly treated the conspiracy as the conduct that must cause domestic harm for jurisdiction to apply. "[I]t is well established by now that the Sherman Act applies to foreign *conduct* that was meant to produce and did in fact produce some substantial effect in the United States. . . . Such is the *conduct* alleged here: that the London reinsurers engaged in *unlawful conspiracies* to affect the market for insurance in the United States and that their conduct in fact produced substantial effect." 509 U.S. at 795-96 (citations omitted; emphasis added).

[7] The panel majority made no independent ruling on standing, holding merely that because the FTAIA deprived the federal courts of subject matter jurisdiction over petitioner's claim, petitioner necessarily lacked antitrust standing. Pet. App. 3a, 22a n.32.

Section 4 of the Clayton Act provides: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . ." 15 U.S.C. § 15(a).[8] Statoil, as a direct purchaser of the defendants' heavy lift services, falls within this defined class of persons. See *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977) (direct purchasers suing for overcharges have standing to sue); *Blue Shield of Va.* v. *McCready*, 457 U.S. 465 (1982) (same). Moreover, Statoil has sustained injury in the form of overcharges of the kind the antitrust laws were meant to forestall – *i.e.*, a loss that "stems from a competition-*reducing* aspect or effect of the defendant's behavior." *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 344 (1990). Accordingly, Statoil clearly has standing under established judicial standards.

At base, respondents' argument is circular. Plaintiffs should not have standing to sue for claims arising overseas, respondents contend, because the antitrust laws are not intended to provide a remedy for plaintiffs suing for claims arising overseas. This is simply not the law. See, *e.g.*, *Pfizer*, 434 U.S. at 315 (where a conspiracy "operated domestically as well as internationally," foreign plaintiffs must be allowed to recover for damages related to profits unlawfully "extort[ed] abroad," so as to assure adequate deterrence to protect American consumers); *Transnor (Bermuda) Ltd.* v. *BP North Am. Petroleum*, 738 F. Supp. 1472 (S.D.N.Y. 1990) (overseas purchaser suing for damages suffered in connection with its purchase of crude oil in London for delivery from the North Sea to Scotland had standing to sue because purchases were made in a unified trading market that included U.S. as well as overseas transactions and the alleged conspiracy harmed purchasers in this country as well). Statoil similarly has standing to pursue claims for damages suffered as the direct result of respondents' unlawful world-wide cartel.

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[8] A "person" is further defined in the Sherman and Clayton Acts as including "corporations and associations existing under or authorized by the laws of . . . any foreign country." 15 U.S.C. §§ 7, 12(a). See also *Pfizer*, 434 U.S. at 320 (stating that a foreign corporation is entitled to sue under the statute and holding that a foreign nation is similarly entitled to sue).

* * * *

The statutory question presented in this Petition is of manifest importance to U.S. antitrust enforcement for both private parties and the federal government. Its resolution has confounded the federal courts, leaving the law, in Judge Higginbotham's words, "a muddled mess." Pet. App. 55a. The question presented is both straightforward and cleanly presented – requiring the Court to explicate the meaning of at most two statutory phrases in the context of a case involving a unified, world-wide market subverted by a single conspiracy. No better vehicle for resolving the question presented is likely ever to arise. Deferral will only exacerbate the confusion that Congress sought to eliminate when it adopted the FTAIA but that both the lower courts and the business community continue to face.

CONCLUSION

For the foregoing reasons as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

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IN THE
Supreme Court of the United States

STATOIL ASA,
Petitioner,

v.

HEEREMAC V.O.F., *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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10pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES i
SUPPLEMENTAL BRIEF FOR THE PETITIONER 1

TABLE OF AUTHORITIES

Cases:

Caribbean Broad. Sys.. v. *Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998)..1

Litton Systems, Inc. v. *Honeywell, Inc.*, No. 99-56892 (9th Cir. argued Mar. 5, 2001)..2

MCI Telecomm. Corp. v. *AT&T Co.*, 512 U.S. 218, 227 (1994)..7

Pfizer, Inc. v. *Government of India*, 434 U.S. 308 (1978)...........4

Virginia Military Inst. v. *United States*, 508 U.S. 946 (1993).....2

Legislative History:

H.R. Rep. No. 97-686, *Foreign Trade Antitrust Improvements Act of 1982*, 97th Cong., 2d Sess. 2, (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487...................3-7

SUPPLEMENTAL BRIEF FOR THE PETITIONER

By invitation of the Court, the Solicitor General has filed a brief recommending against the grant of certiorari. The government argues that the issue is not ripe for review, that the decision of the Fifth Circuit will not impair its own antitrust enforcement efforts, and that the Fifth Circuit's decision is in any event correct on the merits. We respond briefly to each of these points.

A. The Issue Presented Is Ripe for Review.

The government contends that the decision below is not in irreconcilable conflict with the District of Columbia Circuit's decision in *Caribbean Broadcasting System, Ltd.* v. *Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998), because, while the D.C. Circuit found subject matter jurisdiction based on the U.S. domestic impact of the defendant's conduct, it never precisely addressed the narrow issue of whether section 6(a)(2) of the Foreign Trade Antitrust Improvements Act should preclude the plaintiff's claim. Regardless of whether the Court accepts the government's argument that there is technically no conflict, it cannot be denied that the D.C. Circuit reached a legal conclusion contrary to the court below and found jurisdiction on similar facts. As Judge Higginbotham aptly stated, the *Statoil* and *Caribbean* cases together leave the state of the law in a "muddled mess."

The government contends that the question presented is not ripe because there are pending cases in other circuits and that the Court should wait to see if the decisions of these courts present a conflict with *Statoil.* The pendency of so many cases simply attests to the extreme importance of this issue in the context of the government's own initiative to deal with cartels engaged in world-wide conspiracies. The primacy of this issue calls out for an authoritative determination at an early time so as to avoid the enormous expense and international ramifications of a delayed resolution.

None of the pending cases cited will present as good a vehicle as this one for a prompt determination of this issue, for none presents so clearly and simply the essential legal issue to be determined. As the government admits, the Statoil conspiracy undeniably involved a "global price-fixing and market allocation scheme." (U.S. Brf. 1.) There was a single, integrated conspiracy involving a tiny number of competitors operating in what is undeniably a global market (as opposed to a number of parallel conspiracies operating in parallel national markets, as arguably was the case in many of the cases cited). Moreover, as a result of the world-wide market allocation scheme, the harm inflicted on Statoil was suffered entirely abroad and yet was inextricably linked to the corresponding harm suffered by U.S. oil producers in the Gulf of Mexico. Thus, but for the narrow interpretation of section 6(a)(2) adopted by the Fifth Circuit, subject matter jurisdiction would clearly be present.

Furthermore, in the procedural context of the pending cases cited by the government, any ruling that would present a conflict with the Fifth Circuit's decision is likely be interlocutory rather than final in nature and hence not ripe for review under the Court's normal standards. *See, e.g., Virginia Military Inst.* v. *United States*, 508 U.S. 946, (1993) (opinion of Scalia, J., respecting the denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction" (collecting cases)). A ruling for the plaintiffs in all but one of those pending cases would require a remand to the District Court for further proceedings, including a trial on the merits.[1] Even assuming these cases proceed to judgment without settlement, it would be many years before the Court would finally have the opportunity to review this issue – years in which U.S. lower courts and business interests everywhere would be forced to operate in the face of uncertainty on this highly important issue. Congress avowedly enacted the FTAIA to limit just such uncertainty. See H.R. Rep. No. 97-686, *Foreign Trade Antitrust Improvements Act* of 1982, 97th Cong., 2d Sess. 2, at 5, 8-9 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2490, 2493-94, (*"FTAIA Committee Report"*). A grant of certiorari in this case would promote that congressional purpose.

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[1] The only exception in which a conflicting final judgment could conceivably arise without a subsequent trial is *Litton Systems, Inc.* v. *Honeywell, Inc.*, No. 99-56892 (9th Cir. argued Mar. 5, 2001). The history of that case is extremely complicated, and the question presented here is relevant to only a very small aspect of the overall assessment of damages that is being appealed to the Ninth Circuit. Accordingly, the case is highly unlikely to present a suitable vehicle for the Court's review.

B. The Fifth Circuit's Decision Will Impair the Efficacy of Overall U.S. Antitrust Enforcement.

The government maintains that the Statoil decision will have no adverse impact on its own enforcement of the antitrust laws. We agree that the Fifth Circuit's interpretation of section 6(a)2 of the FTAIA should not directly bar the government from prosecuting criminally those whose conspiracy has the requisite jurisdictional effect on U.S. commerce. That is, the government may prosecute conspirators based on the domestic effect, even if they may not take into account the effect overseas.[2] In other respects, however, the arguments pressed by the Solicitor General seem more tenuous. And they take no account whatsoever, of the crucial role that *private* litigation plays in the overall antitrust enforcement scheme Congress enacted.

The government contends, for example, that effects on foreign commerce may be taken into account as an "aggravating circumstance" in assessing fines. Although one can readily appreciate that the government would not want to acknowledge any limitation on its sentencing authority, if U.S. courts have no subject matter jurisdiction over overseas effects of the conspiracy, it is far from clear why such effects are nonetheless properly construed as an "aggravating circumstance." As the government acknowledges, the concept of aggravating circumstances is meant to address elements of a crime that are not taken into consideration in assessing the Base Fine. (2001 Federal Sentencing Guideline Manual § 5K2.0; U.S. Brf. at 9-10.) But the sentencing guidelines expressly do take into account the amount of commerce "affected by the violation." (See USSG § 2R1.1(b)(2).) If the applicable commerce affected is limited to domestic commerce, as the government believes (U.S. Brf. at 8-9), then this should preclude consideration as an aggravating circumstance of additional commerce beyond the scope of the substantive U.S. proscription.

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[2] One must at least question, however, what mischief might be wrought on this issue by the Fifth Circuit's incorrect assertions that U.S. antitrust jurisdiction is constitutionally limited in these circumstances and that a "presumption against extraterritoriality" applies. (Pet. App. 16a; *but see* U.S. Brf. 11 (acknowledging that this presumption does not apply).) For example, query how these principles would apply to a defendant like respondent Saipem, whose role in a conspiracy is to agree *not* to engage in any commerce in the United States.

The government argues that its authority to obtain enhancements based on foreign commerce affected is supported by its negotiation of plea agreements on this basis in two cases, one of them involving the prosecution of respondent HeereMac in connection with the conspiracy at issue here. However, these sentences were negotiated before the Fifth Circuit rendered its decision, and they represented a compromise with respect to the very issue presented in this case. Pet. App. 62a. It seems highly unlikely that the government will find it equally easy to negotiate such plea agreements in the future.

Finally, the appropriate issue here is not limited to the government's interest in its own enforcement authority but rather to the overall interest of the United States in enforcing its antitrust laws. The U.S. antitrust laws rely heavily on private enforcement to assure compliance and deter wrongdoing. As both this Court and Congress have recognized, if private plaintiffs cannot recover damages suffered abroad resulting from a global conspiracy that adversely affects U.S. commerce, deterrence will be inadequate and U.S. consumers will be placed at risk. *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308, 314 (1978); *FTAIA Committee Report* at 10, 1982 U.S.C.C.A.N. at 2495.

C. The Court of Appeals' Ruling Is Incorrect on the Merits.

The government's brief finally asserts that the Fifth Circuit's decision correctly interprets section 6(a)(2) of the FTAIA on the merits. Our petition and reply brief fully explain why the Fifth Circuit's interpretation is unsupportable. We respond below only to the government's points.

First, the Solicitor General makes the conclusory argument that the Fifth Circuit's interpretation is the "most natural reading" of section 6(a)(2) in context. But surely the "most natural meaning of the phrase "give rise to a claim" is "give rise to a claim," not "give rise to the claim of the *particular plaintiff* that is before the court," as the government would have it. (U.S. Brf. 12 (emphasis in brief).) The government's statement that its interpretation is the most natural reading "in the context" is circular, reflecting simply a conclusion that it is the most natural reading to achieve the interpretation adopted by the Fifth Circuit and promoted by the government.[3]

Perhaps absent extrinsic evidence of any alternative purpose, one might surmise that Congress intended the Fifth Circuit's interpretation and that the congressional use of the phrase "give rise to a claim" was simply imprecise drafting designed to achieve this goal. But Congress fully explained its rationale in the legislative history, and this rationale is entirely consistent with the precise statutory language. The House Report expressly states that the purpose of section 6(a)(2) is to assure that an international conspiracy's effect in this country must be not only direct, substantial, and reasonably foreseeable, but also anticompetitive (rather than benign or neutral) in order to give rise to U.S. jurisdiction over such conspiracy. *FTAIA Committee Report* at 11, 18, 1982 U.S.C.C.A.N. 2496, 2500. This principle applies whether the claim is asserted by a private party or the government and precludes claims only when the conduct has no anticompetitive effect in this country at all.

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[3] The actual statutory context makes it clear that the statute's touchstone is whether the *conduct* of the defendants is subject to the law, rather than the *effect* of that conduct. The only exception in which effect does become relevant is contained in the proviso that excuses exporters from liability for effects in foreign markets, but only when the conduct has no effect on domestic commerce. See Pet. 15. This proviso – which the Solicitor General does not discuss – would in turn be rendered meaningless by the Fifth Circuit's interpretation. *Id.*, n.12.

The government's argument (U.S. Brf. 12-13) that Congress intended through section 6(a)(2) to import concepts of standing into considerations of subject matter jurisdiction is belied by the express statement in the House Report that, "the Committee does not intend to alter existing concepts of antitrust injury or antitrust standing." *Id.* at 11, 1983 U.S.C.C.A.N. at 2496. The government's brief also ignores the substantial additional legislative history cited in the Petition, which demonstrates Congress' intent to permit claims in foreign commerce in these circumstances, and Congress' repeated rejections of statutory language that would have supported the interpretation adopted by the Fifth Circuit. See Pet. 12-13 & nn.10-11.

The government next argues (U.S. Brf. 14) that Statoil's interpretation raises the specter of claims being filed in cases where the impact in this country is substantial but nevertheless small in comparison with the impact abroad. Even should this occur, it would not properly invoke the concept of subject matter jurisdiction. Instead, the selection of an appropriate forum for the adjudication of claims involving overlapping jurisdiction is properly based on other concepts such as comity, abstention, and forum non conveniens.[4]

Finally, the government asserts (U.S. Brf. 15-16) that the Fifth Circuit's interpretation of section 6(a)(2) should be adopted because enactment of new antitrust legislation by many foreign countries has allegedly narrowed the gap in deterrence that would necessitate recovery of damages suffered overseas. As a matter of statutory interpretation, however, such subsequent events are irrelevant in determining congressional intent in adopting the FTAIA, for Congress was necessarily concerned with the adequacy of enforcement at the time of enactment. *See MCI Telecomm. Corp.* v. *AT&T,* 512 U.S. 218, 227 (1994) (the most relevant time for determining a statutory term's meaning is when the statute became law).

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[4] Similar issues involving overlapping jurisdiction arise with respect to governmental enforcement in the context of the antitrust review of international mergers and criminal enforcement against international cartels. The government may choose to defer to a foreign authority in some such instances. Nevertheless, the government surely does not mean to argue that it should be denied the jurisdiction to proceed where there is a substantial impact in this country, even if the impact may be greater abroad.

Moreover, the government's point simply ignores the practical difficulties faced by multiple U.S. and foreign private plaintiffs and indeed governments in asserting multiple antitrust claims against multiple defendants in every jurisdiction affected by a global conspiracy. Deterrence cannot be adequate if it is impracticable to bring the actions necessary to obtain full restitution of ill-gotten gains. A cartel will bear full responsibility for its actions only if it can be called to account for all of the harm it has caused in a single court proceeding.

* * * * *

The issue presented in this case is of great importance, and this case provides the best and probably the only suitable vehicle for the prompt Supreme Court review that is appropriate. The statutory interpretation adopted by the Fifth Circuit presents a far more limited view of antitrust jurisdiction than the one adopted by Congress or reflected in the jurisprudence of this Court. For those reasons, and because the decision below will impair the efficacy of overall antitrust enforcement, the petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

STATOIL ASA,
Petitioner,

—v.—

HEEREMAC, V.O.F., *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF THE McDERMOTT AND HEEREMA RESPONDENTS

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July 12, 2001

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Sherman Act does not afford relief to a foreign plaintiff complaining of injury suffered in foreign commerce, when such injury does not arise from proscribed effects on United States trade or commerce.

2. Whether the court of appeals correctly held that a showing of antitrust injury may not be predicated upon allegations that persons other than plaintiff suffered proscribed anticompetitive effects in United States trade or commerce.

LIST OF PARTIES BELOW

The parties to the appeal in the United States Court of Appeals for the Fifth Circuit were as follows:

Statoil ASA, previously known as Den norske stats oljeselskap a.s., was the Plaintiff-Appellant.

Heeremac, v.o.f.; Heerema Marine Contractors; Heerema Offshore Services U.S., Inc.; Heerema Offshore Construction Group, Inc.; Jan Meek; Pieter Heerema; McDermott International, Inc.; McDermott Inc.; J. Ray McDermott, S.A.; J. Ray McDermott, Inc.; J. Ray McDermott Gulf Contractors, Inc.; McDermott Engineers & Constructors (USA), Inc.; McDermott Engineering Houston, L.L.C.; McDermott-ETPM, Inc.; Saipem SpA; Saipem International B.V.; Saipem UK Limited; and Saipem (Portugal)-Comerico Maritimo, Sociedade Unipessoal, S.A. were the Defendants-Appellees.

RULE 29.6 STATEMENT

Respondent McDermott International, Inc. ("McDermott") is a public corporation. No public corporations hold more than ten percent of McDermott stock. Respondents McDermott Inc.; J. Ray McDermott, S.A.; J. Ray McDermott, Inc.; J. Ray McDermott Gulf Contractors, Inc.; McDermott Engineers & Constructors (USA), Inc.; McDermott Engineering Houston, L.L.C.; and McDermott-ETPM, Inc. are or were direct or indirect wholly-owned subsidiaries of McDermott.

Respondent Heerema Marine Contractors ("Heerema") is a privately owned corporation. Respondents Heerema Offshore Services U.S., Inc. and Heerema Offshore Construction Group, Inc. are or were direct or indirect wholly-owned subsidiaries of Heerema.

HeereMac, v.o.f., which was dissolved in 1997, was a concentrative joint venture between J. Ray McDermott, S.A. and Heerema Offshore Construction Group, Inc. under the laws of The Netherlands.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES BELOW ii

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

COUNTERSTATEMENT OF THE CASE 1

Facts 2

Decision of the Court of Appeals 4

REASONS FOR DENYING THE WRIT 5

I. The Court of Appeals Correctly Applied Governing Law in Rejecting Statoil's Novel Theory of Derivative Jurisdiction and Standing 5

II. The Decision Below Does Not Conflict with Decisions of Other Circuits or Rulings of This Court 9

III. The Petition Raises No Other Issue Worthy Of This Court's Review 17

CONCLUSION 20

TABLE OF AUTHORITIES

Cases — **Page(s)**

Braxton v. United States, 500 U.S. 344 (1991) 16

Brown v. Texas, 522 U.S. 940 (1997) 16

Caribbean Broadcasting System, Ltd. v. Cable & Wireless, PLC, 148 F.3d 1080 (D.C. Cir. 1998) 9-11

de Atucha v. Commodity Exchange, Inc., 608 F.Supp. 510 (S.D.N.Y. 1985) .... 14n.

EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991) 7, 7n

Empagran S.A. v. F. Hoffman-La Roche, Ltd., Civ. No. 00-1686, 2001 WL 761360 (D.D.C. June 7, 2001) .... 11, 15.

Ferromin International Trade Corp. v. UCAR International, Inc., C.A. No. 99-693, slip op. (E.D. Pa. June 13, 2001) 11, 14-15

Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993) 4, 12-13

Cases **Page(s)**

Kruman v. Christie's International PLC, 129 F.Supp.2d 620 (S.D.N.Y. 2001) .... 15, 16n.

Laker Airways Limited v. Sabena, 731 F.2d 909 (D.C. Cir. 1984) .... 11n.-12n.

Lantec, Inc. v. Novell, Inc., Case No. 2:95-CV-97-ST, 2000 U.S. Dist. LEXIS 19905 (D. Utah Sept. 15, 2000) 11, 15

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) .... 5, 13, 13n.

McGlinchy v. Shell Oil Co., 845 F.2d 802 (9th Cir. 1988) .... 12, 12n.

McMillan v. Pennsylvania, 477 U.S. 79 (1986) .... 18n.

McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936) .... 7n.

Metallgesellschaft AG v. Sumitomo Corp., 117 F.Supp.2d 875 (W.D. Wis. 2000) .... 11, 15, 15n.-16n.

In re Microsoft Corp. Antitrust Litigation, 127 F.Supp.2d 702 (D. Md. 2001) 14n., 15

Cases

Page(s)

Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978) 13-14

Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) .... 7n.

United Phosphorus, Ltd. v. Angus Chemical Co., 131 F.Supp.2d 1003 (N.D. Ill. 2001) 15

United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) .... 6n.

United States v. Nippon Paper Industries Co., 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998) 12, 18

West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83 (1991) .... 8n.

Constitutional Provisions

United States Constitution, Article I, § 8 .... 6n.

Statutes

Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (1994) .... passim

Sherman Act, 15 U.S.C. §§ 1 *et seq.* (1994) .... passim

Page(s)

Other Authorities

Foreign Trade Antitrust Improvements Act: Hearings on H.R. 2326 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 97th Cong. (1981) .... 17n.

H.R. Rep. No. 97-686, Foreign Trade Antitrust Improvements Act of 1982, 97th Cong., 2d Sess. (1982) .... 6, 8-9, 9n., 17, 17n.

Supreme Court Rule 10 16

United States Sentencing Guidelines Manual §§ 2R.1.1, 8C2.1 *et seq.* (1998) 18

The McDermott and Heerema Respondents respectfully submit that a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on February 5, 2001 should not issue because no question worthy of the exercise of the Court's certiorari jurisdiction is presented and no error was committed by the court below.

COUNTERSTATEMENT OF THE CASE

The opinion below is a sound application of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") to antitrust claims that lack the requisite nexus to the U.S. marketplace. It imposes no limits on the rights of foreign plaintiffs to pursue claims that arise from direct, substantial and reasonably foreseeable anticompetitive effects on U.S. commerce (a standard that Petitioner does not meet), and it does not preclude the U.S. government from vigorously prosecuting foreign-based activities that cause such effects. The only practical effect of the ruling is to relegate Petitioner's non-U.S. claims to the Norwegian forum where they are now pending, subject to the choice of law provisions in Petitioner's project agreements. A contrary ruling would have placed U.S. courts in the unintended position of policing competitive conditions worldwide.

The *Statoil* opinion does not conflict with the rulings of this Court or the decisions of any other circuit court, and Petitioner's assertion that the law on this subject is in disarray ignores the uniform body of case law in accord with *Statoil*. Petitioner is unable to cite a single decision, in the nineteen-year history of the FTAIA, that extends Sherman Act jurisdiction to claims that do not arise from an anticompetitive effect on U.S. trade or commerce.

Facts

Petitioner Statoil ASA (which brought this action under its previous name, Den norske stats oljeselskap a.s.) is a Norwegian corporation with its principal place of business in Norway. Amended Complaint ¶ 1.[1] Statoil is owned by the Government of Norway and owns and operates off-shore oil and gas platforms in the Norwegian Sector of the North Sea. *Id.* p. 1 and ¶¶ 76, 80. Statoil purchased heavy-lift marine construction services in the North Sea from HeereMac, v.o.f., and Saipem UK Limited, which had their principal places of business in The Netherlands and England, respectively. The contracts governing these sales contained forum selection and choice of law clauses that require dispute resolution under Norwegian law. 16 R. 677-74, 416, 411, 485, 477-43, 434, 430-27.[2]

Statoil alleges that as a result of a "single conspiracy . . . worldwide in scope," it was overcharged for heavy-lift services it commissioned from non-U.S. contractors in Norway, and that "[its] damages have been incurred in connection with projects in the Norwegian Sector of the North Sea." Amended Complaint p. 2 and ¶¶ 55, 61-63, 65, 72, 77, 80. In December 2000, Statoil filed parallel complaints against Respondents in Norway, seeking damages under the Norwegian Competition Act of June 11, 1993, the Norwegian Prices Act and attendant Regulations on Restrictive Trade Agreements on Prices and Mark-Ups, *inter alia*, based on the same facts it alleges here. *See* Pet. at 10 n.8.[3] In its antitrust complaints in Norway, Statoil reiterates that its alleged injury arose from market restrictions there:

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[1] The allegations in Statoil's Amended Complaint were assumed to be true for purposes of Defendants' motions to dismiss.

[2] Citations in this form are to the record below.

> "In this case the place in which the harmful event was caused coincides with the place in which the harm arose. The restrictive practices cooperation has had consequences for the demand for heavy-lift services in Norway. Moreover, the damage was caused in Norway in that Statoil's head office is located in Stavanger [Norway] and it was in Stavanger that the excessive price was paid." A17, ¶ 3.1.3.

Statoil does not allege that it owns, operates or has commissioned any oil drilling platforms within the territorial waters of the United States, or that it purchased any heavy-lift marine construction services in this country. Statoil does not allege that it conducted business with any contractor in the United States or with any contractor incorporated here. Statoil does not contend that its alleged injuries arose from any anticompetitive effect on U.S. trade or commerce. Rather, it asserts that *other* oil companies paid higher prices for heavy-lift marine construction services in the Gulf of Mexico as a result of collusive conduct directed against those unrelated oil companies. (*See* 16 R. 391, 390-89; ¶¶ 74, 78.) Although Statoil had no involvement with those transactions and was not injured thereby, it asked the district court to assert jurisdiction over its claims and to afford it antitrust standing, based on allegations that other persons could show injuries arising from the anticompetitive effects of the alleged conspiracy on U.S. trade or commerce. The district court dismissed Statoil's Amended Complaint, and the Court of Appeals for the Fifth Circuit affirmed.

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[3] A representative sample of Statoil's Norwegian complaints against Respondents has been lodged with this Court. Citations in the form A___ are to Respondents' Lodging.

Decision of the Court of Appeals

The court below followed the express dictates of Congress, embodied in the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), in holding that claims of antitrust injury that do not arise from anti-competitive effects on U.S. commerce are not actionable under the Sherman Act.[4] In particular, the court affirmed the dismissal of Statoil's Sherman Act claims arising from alleged overcharges by Dutch and British contractors for services contracted for in Norway and performed in the Norwegian section of the North Sea.

This ruling did *not* depart from the principle "that the Sherman Act applies to foreign conduct that was meant to and did in fact produce some substantial effect in the United States." *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796 (1993). The court acknowledged that foreign plaintiffs injured by reason of proscribed effects on U.S. commerce may assert Sherman Act claims. 18a n.28. However, it rejected Petitioner's unfounded view that a claimant whose injury did *not* arise from proscribed domestic effects may nevertheless bring a Sherman Act claim whenever the claims of any other person satisfied that jurisdictional test. 18a-19a. The court correctly concluded that Statoil's unprecedented reading of the antitrust laws "would open United States courts to global claims on a scale never intended by Congress." 22a.

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[4] Copies of the court of appeals' ruling and the text of the FTAIA are reproduced in the Appendix annexed to the Petition for a Writ of Certiorari. Citations in the form __ a are to pages in Petitioner's Appendix.

The court's ruling found ample support in the text of the FTAIA and its legislative history (including key passages elided in the Petition) (14a-20a), and in this Court's admonition that "United States antitrust laws do not regulate the competitive conditions of other nations' economies." 3a (quoting *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S 574, 582 (1986)). The decision distinguished a supposedly conflicting circuit court case on the basis of its materially different facts (20a), and it noted the uniform rejection of Petitioner's approach by district courts within various other circuits. *Id.* The court also took note of Petitioner's inability to cite a single case that adopted the dramatic expansion of Sherman Act jurisdiction and standing it proposes here. *Id.* The panel majority carefully considered and answered each of the objections raised in the dissenting opinion. *See* 12a n.19, 14a n.23, 16a n.25, 17a n.27, 18a n.28, 20a n.30, 21a n.31. Statoil's petition for a panel rehearing and for rehearing en banc was denied. 54a.

REASONS FOR DENYING THE WRIT

I.

The Court of Appeals Correctly Applied Governing Law in Rejecting Statoil's Novel Theory of Derivative Jurisdiction and Standing

Statoil's lawsuit is based on the alleged payment of overcharges by a foreign corporation on foreign construction contracts performed by Dutch and British corporations in Norwegian waters, allegedly to the detriment of Statoil's operations in Norway, with no direct repercussions on the U.S. marketplace. Because the Sherman Act does not regulate trade or commerce *among* foreign nations, such claims are inherently beyond the jurisdiction of U.S. courts.[5]

The court below rejected Statoil's argument that the Foreign Trade Antitrust Improvement Act of 1982 had somehow extended Sherman Act jurisdiction to encompass all repercussions of an alleged global conspiracy so long as any aspect of the conspiracy was actionable here. This decision is clearly correct. The FTAIA was not enacted to expand Sherman Act jurisdiction, but rather "to promote certainty in assessing the applicability of American antitrust law to international business transactions. . . ." H.R. Rep. No. 97-686 97th Cong., 2d Sess. (1982) ("H.R. Rep.") at 9. Congress noted that "legislative clarification" in this area was appropriate because courts had differed "in their expression of the proper test for determining whether United States jurisdiction over international transactions exists." It therefore amended both the Sherman Act and the FTC Act to "formulate a standard to be applied uniformly throughout the judicial system." *Id.* at 6.[6]

As it relates to Statoil's antitrust claim, the FTAIA provides that the Sherman Act "*shall not apply*" to conduct involving non-import foreign trade or commerce "*unless*" it produces a direct, substantial and reasonably foreseeable effect on U.S. domestic commerce, "*and such effect gives rise to a claim under [the Sherman Act].*" 15

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[5] Footnote 18 of the opinion below recognizes the limitation of Article I, § 8 of the Constitution, authorizing Congress to "regulate commerce with foreign nations." *See* 30a n.18.

[6] In this regard, Congress cited with favor the observation of Judge Learned Hand, speaking for the Second Circuit acting in place of the Supreme Court, that "[w]e should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States." *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945). *See* H.R. Rep. at 5.

U.S.C. § 6a, sections 1(A) and (2); 72a - 73a (emphasis added). The common-sense meaning of this restriction puts Statoil's claim beyond the reach of the Sherman Act because it does not arise from the domestic effects that Statoil cites as a basis for jurisdiction. No provision in the FTAIA creates jurisdiction over claims arising from competitive harm in foreign markets.

Statoil's argument to the contrary is based on a novel reading of section 2 of the FTAIA to provide that if *any* person can state a Sherman Act claim based on the domestic anticompetitive effects of an alleged global conspiracy, then *every* adverse effect worldwide may be redressed by U.S. courts. Such a drastic growth of Sherman Act jurisdiction surely cannot be inferred from the mere use of the indefinite article "a" in a statute designed to define jurisdictional limits. *See EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 251 (1991) ("[I]f we were to permit possible, or even plausible, interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption.").[7]

The legislative history of the FTAIA gives no hint that Congress intended to expand Sherman Act jurisdiction in the manner Statoil asserts. As originally reported by the House Judiciary Committee, section 2 of the bill stated that the proscribed effect necessary to satisfy section 1 must also be "the basis of the violation alleged." H.R. Rep. at 18. This language was added to "require that *the 'effect' providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws.*" *Id.* at 12 (emphasis added). Congress explained that it included this limitation to clarify that the bill was not "intended to confer jurisdiction on injured persons when *that injury* arose from conduct with no anticompetitive effects on the domestic marketplace." *Id.* at 11 (emphasis added). Petitioner puts undue emphasis on a subsequent change in the wording of section 2 to require that "such effect give[ ] rise to a claim" under the Sherman Act. But the proponent of this technical change explained that the new language "accomplishes the same result as the Committee version" – *i.e.,* to specify that the basis of American antitrust jurisdiction must be a domestic anticompetitive effect. *Id.* at 18. The language adopted does not suggest an intent to amend the Sherman Act to reach claims that do not arise from such an effect.[8]

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[7] As plaintiff, Statoil bears the burden of demonstrating the subject matter jurisdiction of the district court. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 188-89 (1936). Because it is arguing for the expansion of the extraterritorial reach of the Sherman Act, Statoil also bears the heavy burden of demonstrating "the affirmative intention of the Congress clearly expressed" in favor of such expansion. *See Arabian American Oil Co.*, 499 U.S. at 248; *Sale v. Haitian Ctrs. Council Inc.*, 509 U.S. 155, 188 (1993) ("Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested.").

In view of Congress' unequivocal formulation of this domestic effects test, Statoil reads too much into the observation that the qualifying impact does not have to be "experienced by the injured party within the United States." *Id.* at 12. This merely reiterates Congress' statement, "as previously set forth", that no matter where they take title, "[f]oreign purchasers should enjoy the protection of our antitrust laws *in the domestic marketplace*" with respect to "*a course of conduct in the United States.*" *Id.* at 10 (emphasis added). Statoil omits this key language from its quotation of the House Report. *See* Pet. at 18.[9]

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[8] Statoil did not mention Mr. Rodino's "additional views" before the court of appeals issued its ruling. In no event could the isolated remarks of a single legislator serve as a clear manifestation of Congress' intent to expand Sherman Act jurisdiction. *See West Virginia University Hospitals, Inc. v. Casey,* 499 U.S. 83, 98-99 (1991) ("Where the [statutory text] contains a phrase that is unambiguous – that has a clearly accepted meaning in both legislative and judicial practice – we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.").

II.

The Decision Below Does Not Conflict With Decisions Of Other Circuits Or Rulings Of This Court

Petitioner repeatedly implies that the Fifth Circuit's interpretation of the FTAIA is in conflict with the rulings of other circuits. However, the single decision on which Petitioner posits a conflict is consistent with the decision below, although a materially different set of facts yielded a different outcome. *See Caribbean Broadcasting System v. Cable & Wireless PLC,* 148 F.3d 1080 (D.C. Cir. 1998) (holding that a radio broadcaster whose market included Puerto Rico and the U.S. Virgin Islands should have been allowed to file an amended complaint that "more clearly alleged an effect upon U.S. commerce" to satisfy the requirements of the FTAIA). Far from adopting a standard different from that in *Statoil,* the Court of Appeals for the D.C. Circuit observed that the FTAIA permits jurisdiction over foreign conduct "only to the extent" that such conduct produces anticompetitive harm in the U.S. market. *Id.* at 1085. *See* Pet. at 13 n.10.

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[9] Statoil inexplicably cites the FTAIA's export trade proviso as support for its expansive reading of the statute. The proviso states that if the Sherman Act applies to conduct only because it produces a proscribed effect on U.S. export trade, a remedy is available only for injury to export business in the United States. This restriction reinforces Congress's concern with protecting U.S. trade or commerce by emphasizing that the foreign side of an export transaction is not the concern of the Sherman Act. It was unnecessary to specify this limitation for injuries arising from harm to U.S. domestic or import commerce because by definition such injuries have the required nexus. In any event, Congress specified that transactions between foreign firms "should, for purposes of this legislation, be treated in the same manner as export transactions." H.R. Rep. at 9.

The *Caribbean* court did not allow a plaintiff in foreign commerce to "piggy-back" a Sherman Act claim on the alleged injury of unrelated parties in U.S. domestic commerce. Rather, it noted that case law rejecting that approach did not apply to the facts at hand because plaintiff there was able to satisfy the requirements of the FTAIA in its own right. *Id.* at 1086. Plaintiff's proposed amended complaint included allegations that (1) the eastern Caribbean market for the sale of radio advertising includes Puerto Rico and the U.S. Virgin Islands; (2) plaintiff competes with defendants for the sale of advertising to customers in the United States; and (3) defendants had improperly locked up available advertising contracts in the U.S. market, causing direct injury to plaintiff by foreclosing it from the U.S. marketplace. *Id.* at 1086-87. The court ruled that such allegations supported Sherman Act jurisdiction because plaintiff's foreclosure from selling advertising to U.S. advertisers deprived the latter of the benefits of competition. *Id.* at 1087. Plaintiff's alleged injury in *Caribbean* thus arose from anticompetitive domestic effects, as the FTAIA requires.

The court below recognized that plaintiffs who can make such a showing may invoke the subject matter jurisdiction of the U.S. courts. *See* 20a. However, it affirmed the dismissal of Statoil's complaint because, in contrast to the plaintiff in *Caribbean,* Statoil could not allege that its injury arose from the domestic anticompetitive harm it cited as a basis for its Sherman Act claim. *Id.*

Perhaps the clearest indication of the absence of a conflict between these circuits is the fact that just last month the district court for the District of Columbia, in an opinion by Chief Judge Thomas F. Hogan, relied on *Statoil* (and numerous other consistent cases) to reject a claim of derivative Sherman Act jurisdiction of precisely the sort asserted here. *See Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, Civ. No. 00-1686, 2001 WL 761360, at *2 (D.D.C. June 6, 2001), *appeal docketed* (D.C. Cir. July 7, 2001):

> "[U]nder federal antitrust law, to establish subject matter jurisdiction over this action, plaintiffs must allege that the conduct causing their injuries resulted in a 'direct, substantial, and reasonably foreseeable effect on U.S. commerce.' In addition, plaintiffs must also allege that the injuries they seek to remedy 'arise' from an anticompetitive effect of defendants' conduct on U.S. commerce. In other words, the effect providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws."

District courts within other circuits have likewise distinguished *Caribbean Broadcasting* as a case where "it was in fact the substantial effect on United States commerce which gave rise to plaintiff's injury and claim under the antitrust laws." *Ferromin International Trade Corp. v. UCAR International, Inc.*, C.A. No. 99-693, slip op. at 7 (E.D. Pa. June 13, 2001) (reproduced in Respondents' Lodging at B-1 *et seq.*); *accord Metallgesellschaft AG v. Sumitomo Corp.*, 117 F. Supp. 2d 875, 885-86 (W.D. Wisc. 2000); *Lantec, Inc. v. Novell, Inc.*, Case No. 2:95-CV-97-ST, 2000 U.S. Dist. LEXIS 19905, at *17 (D. Utah, Sept. 15, 2000).[10]

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[10] The earlier ruling of the D.C. Circuit in *Laker Airways Limited v. Sabena*, 731 F.2d 909 (D.C. Cir. 1984), is also consistent with *Statoil*. The *Laker* complaint alleged "a conspiracy to drive out of business a corporation permitted by United States treaty to operate within the

Footnote continued on next page.

Petitioner also cites several cases that supposedly reflect "a considerably more expansive interpretation of antitrust jurisdiction" than that reflected in *Statoil* (*see* Pet. at 28), even though none of them "reach[ed] the precise question addressed by the court below." *Id.* These decisions merely articulate the generic, uncontested principle that foreign activities may trigger Sherman Act jurisdiction in appropriate cases – a concept that the *Statoil* opinion accepts. None of them considers the application of the FTAIA to the claims of a foreign plaintiff arising from the non-U.S. effects of an alleged global conspiracy. *E.g.*, *United States v. Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998) (sustaining an indictment based on an alleged conspiracy to raise prices on products intended for import into the United States). One even confirms that purely foreign conduct and effects lie beyond the jurisdiction of the Sherman Act. *See McGlinchy v. Shell Oil Co.*, 845 F.2d 802 (9th Cir. 1988).[11]

This Court's comity analysis in *Hartford Fire* also has no bearing on Statoil's Petition, except as further confirmation that the goal of Sherman Act regulation is the prevention of anticompetitive effects in the U.S. domestic marketplace. *See Hartford Fire*, 509 U.S. at 796. De-

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Footnote continued from previous page.

United States and conducting substantial business here." *Id.* at 955. The court's assertion of jurisdiction was a routine application of the principle that participants in the U.S. domestic marketplace may seek redress under the Sherman Act for injuries arising from harm caused by foreign activity to U.S. trade or commerce.

[11] *McGlinchy* supports the decision below on the alternative ground that conduct directed against a participant in a foreign market does not have a direct, substantial and reasonably foreseeable effect on U.S. commerce. *See McGlinchy*, 845 F.2d at 813 (citing Section (1)(A) of the FTAIA).

fendants in *Hartford Fire* were domestic and British reinsurers accused of conspiring to withhold certain products from the U.S. insurance market. The intended and actual result of the alleged conduct was to harm the market for insurance in the United States. *Id.* Because the defendants conceded subject matter jurisdiction, the only questions before the Court were the availability of McCarran-Ferguson Act immunity, and the application of principles of international comity in the context of a regulated industry. Under these circumstances, this Court's reference to the maxim that the Sherman Act applies to foreign conduct that produces anticompetitive domestic effects cannot fairly be read as an endorsement of Petitioner's view that nondomestic effects of an international conspiracy are actionable here. Indeed, that construction would conflict with this Court's more relevant observation in *Matsushita* that "American laws do not regulate the competitive conditions of other nations' economies." *Matsushita,* 475 U.S. at 582.[12]

Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978), likewise lends no support to Statoil's theory. In *Pfizer* the Court was faced only with the question whether antitrust remedies should be available "*[w]hen a foreign nation enters our commercial markets* as a purchaser of goods or services." *Id.* at 318 (emphasis added). It ruled only "that a foreign nation otherwise entitled to sue in our courts is entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff." *Id.* at 320. *Pfizer* preceded the enactment of the FTAIA by four years, and this Court did not consider the applicability of the Sherman Act to injuries sustained outside the U.S. domestic marketplace.

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[12] As this Court explained in *Matsushita,* "However one decides to describe the contours of the asserted conspiracy—whether there is one conspiracy or several—respondents must show that the conspiracy caused them an injury for which the antitrust laws provide relief." *Matsushita,* 475 U.S. at 584 n.7 (holding that Court of Appeals had erred in allowing plaintiffs to base antitrust claims on aspects of an alleged international conspiracy that did not injure them).

Finally, Petitioner is flatly wrong in contending that "no other courts that have construed the FTAIA have adopted a requirement that the injury giving rise to jurisdiction must arise directly from an effect on U.S. commerce." Pet at 27. District courts within at least five other circuits have addressed the same theory of bootstrap jurisdiction presented in Statoil's Petition. (These civil suits have typically followed well-publicized prosecutions of international cartels.) Every district court that has considered this issue has rejected the application of the Sherman Act to claims of foreign plaintiffs that do not arise from adverse effects on U.S. commerce.[13] *See, e.g., Ferromin,* slip op. at 8, 11:

> "Based on the plain language of the FTAIA and the above authority, we find that the FTAIA permits jurisdiction over antitrust claims of foreign plaintiffs who were injured in foreign market places only where the complained-of conduct had a direct, substantial and reasonably foreseeable effect on the domestic market place *and* that this anticompetitive effect on the domestic marketplace gave rise to their injuries."
>
> * * *
>
> "[I]f we were to exercise subject matter jurisdiction despite plaintiffs failure to show the requisite causal connection, we would in effect be ex-

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[13] Some cases have premised the dismissal of claims arising from non-U.S. injury on the plaintiff's lack of standing in addition to or instead of lack of Sherman Act jurisdiction. *See, e.g., In re Microsoft Corp. Antitrust Litigation,* 127 F.Supp. 2d 702 (D. Md. 2001); *de Atucha v. Commodity Exchange, Inc.,* 608 F. Supp. 510 (S.D.N.Y. 1985).

> tending the Sherman Act to cover claims for damages suffered by foreign companies solely because of decreased competition and higher prices in foreign markets, thereby inviting foreign customers, lured by the prospect of treble damages, to flood the United States courts. We do not think this is the result Congress intended in enacting the FTAIA." (emphasis in original; citations omitted.)

Accord Empagran, 2001 WL 761360, at *2 (same); *Sumitomo,* 117 F. Supp. 2d at 877, 887 (same); *Kruman v. Christie's International PLC,* 129 F. Supp. 2d 620 (S.D.N.Y. 2001) (same); *In re Microsoft Corp. Antitrust Litigation,* 127 F. Supp. 2d 702, 715 (D. Md. 2001). *See also United Phosphorus, Ltd. v. Angus Chemical Company,* 131 F.Supp.2d 1003, 1008 (N.D. Ill. 2001) ("'[A] foreign company cannot demonstrate the domestic injury requirement by piggy-backing onto the injury of a United States exporter.'") (citation omitted); *Lantec,* 2000 U.S. Dist. LEXIS 19905, at *19 (rejecting argument that Sherman Act applies to a claim of foreign injury that is "inextricably intertwined" with U.S. domestic injury).[14]

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[14] The court in *Sumitomo* expressly considered and rejected the notion that the term "a claim" in section 2 of the FTAIA permits jurisdiction based on claims other than plaintiff's own claim. 117 F. Supp. 2d at 833:

> "Plaintiffs' reading is that '*a*' claim means only that there must be *some* claim that arises, whether or not it is the claim that the plaintiff is asserting. I find this reading unpersuasive. It does not acknowledge either the language of the act, which is explicit in stating that it is the effect of the conduct that is the focus of Congress's concern, the congressional purpose in enacting the legislation, which was to clarify the antitrust laws 'to make explicit their application only to conduct having a "direct, substantial, and reasonably foreseeable effect" on domestic commerce or domestic exports,' or the comity concerns that would be implicated by expanding the reach of American antitrust law to remedy anticompetitive effects on a foreign market . . . . " (emphasis in original).

In contrast, Statoil has not cited a single case in which a court sustained an antitrust claim based on foreign-based injury that does not arise from proscribed harm to the U.S. marketplace. Thus, far from being in "disarray," or in a "muddled mess," the case law that has developed on this issue over the last two decades is in full accord with *Statoil* and runs directly and uniformly against the position asserted by Petitioner.

It remains to be seen whether the pending appeals of some of the foregoing district court rulings will yield the novel and unfounded result Petitioner urges here. Several appellate courts will consider this subject in the near future,[15] and this Court may benefit from the development of relevant case law in other circuits. However, since the illusory conflict suggested by Petitioner may never emerge, any issue potentially worthy of certiorari is far from ripe. *See Brown v. Texas*, 522 U.S. 940 (1997) (denying petition for writ of certiorari and noting that "the likelihood that the issue will be resolved correctly may increase if this Court allows other tribunals 'to serve as laboratories in which the issue receives further study before it is addressed by this Court.'") (citation omitted); *Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States court of appeals and state courts concerning the meaning of provisions of federal law.") The decision of the Fifth Circuit is not in conflict with the decision of another federal court of appeals or any state court; nor is it contrary to any ruling of this Court. Accordingly, certiorari is not warranted. *See* Sup. Ct. R. 10.

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[15] Appeals have already been docketed in *Sumitomo*, No. 00-3700 (7th Cir. Oct. 16, 2000), *Kruman*, No. 01-7307 (2d Cir. Mar. 19, 2001), and *Empagran* (D.C. Cir. July 6, 2001).

III.

The Petition Raises No Other Issue Worthy Of This Court's Review

Like the dissenting opinion below, Statoil raises the specter of international lawlessness as a result of the court of appeals' decision. This argument invites the Court to substitute its own judgment for the policy choices inherent in the FTAIA. In enacting the FTAIA Congress expressly considered and rejected criticism regarding the risks of international cartels, noting that "[b]y more precisely defining the subject matter jurisdiction of U.S. antitrust law, [the FTAIA] in no way limits the ability of a foreign sovereign to act under its own laws against an American-based export cartel having unlawful effects in its territory." H.R. Rep. at 13-14. While confirming that any spill-over effects of foreign activity on U.S. commerce will remain subject to prosecution here (*id.* at 13), Congress noted that "the clarified reach of our own laws could encourage our trading partners to take more effective steps to protect competition in their markets." *Id.* at 14.[16] These remarks comport with the plain meaning of the FTAIA and reinforce the presumption that Congress enacted this legislation with domestic concerns in mind, and with the intent of requiring the victims of foreign market effects to seek redress in their home markets. It bears repeating in this regard that Statoil is currently pursuing antitrust remedies in Norway based on the same allegations raised in its Amended Complaint.

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[16] In declining to modify the text of the FTAIA in response to a commentator's concerns about international enforcement, *see* H.R. Rep. at 14, Congress cited with favor the comments of James R. Atwood before the House Committee on the Judiciary. *Id. See* Foreign Trade Antitrust Improvements Act: Hearings on H.R. 2326 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 97th Cong. 91-93 (1981) (statement of James R. Atwood, at 6-8). In the referenced portion of his statement, Mr. Atwood observed that "over-expansive interpretations of the Sherman Act . . . can impede U.S. export performance" and allow foreign plaintiffs "to frustrate the local, industrial or social policies of their home governments." *Id.* at 91-92 (footnote omitted). He endorsed the FTAIA as an opportunity to clarify "that effects in foreign markets are the domain of foreign rather than American law" and to "make clear to foreign governments that the protection of competition within their home markets is their responsibility, not the responsibility of the United States." *Id.* at 92.

Petitioner is also mistaken in arguing that the *Statoil* opinion will somehow impair the ability of the U.S. government to prosecute foreign conduct that harms the interests of American consumers. Unlike claimants such as Statoil who complain of the foreign effects of foreign transactions, the U.S. government represents the interests of domestic consumers in prosecuting conduct anywhere in the world that has the proscribed effect on the U.S. marketplace. *See Nippon Paper Industries Co.*, 109 F.3d at 4. Moreover, although the focus of the United States Sentencing Guidelines is on "the impact of defendants' conduct on American business and consumers," *United States Sentencing Guidelines Manual* §§ 2R.1.1, 8C2.1 *et seq.* (1998), nothing in the *Statoil* ruling will impair the government's ability to consider a defendant's worldwide sales in determining the seriousness of the defendant's role in an offense that harms U.S. trade or commerce. *See id.*[17]

Statoil's deterrence argument, if accepted, would nullify the express limitations on Congress' power to regulate foreign commerce and place the United States in the unwanted position of regulating competition throughout the world. The scope of this proposed expansion is breathtaking. It would mean that any conspiracy that gives rise to any Sherman Act claim in the United States would open the U.S. courts to treble damage actions for all damages suffered worldwide – whether or not the conduct that injured foreign plaintiffs is prohibited in their own countries, and even if (as here) the alleged injury has no meaningful nexus to U.S. commerce. Statoil's broad policy arguments do not support this unauthorized and unworkable result.

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[17] **Petitioner appears to confuse jurisdiction (a necessary predicate for prosecution) with the aggravating factors that courts may consider in determining a sentence. *See generally McMillan v. Pennsylvania*, 477 U.S. 79 (1986).**

Whether the goal of deterrence would be better served by expanding the jurisdictional reach of the Sherman Act is, respectfully, a consideration better left to Congress. Statoil has asserted its claims of foreign-based injury before the appropriate tribunal in Norway, and requires no intervention by this Court to protect its interests there.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: July 12, 2001

Respectfully submitted,

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No. 00-1842

In the Supreme Court of the United States

STATOIL ASA, PETITIONER

v.

HEEREMAC V.O.F., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE

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22 pp

QUESTION PRESENTED

Whether federal courts have jurisdiction under the Sherman Act and the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 1, 6a, over the claims of a foreign plaintiff that it has been injured by a conspiracy that has direct, substantial, and reasonably foreseeable anticompetitive effects on United States trade or commerce, if the foreign plaintiff's claimed injury does not arise from those domestic effects.

TABLE OF CONTENTS

Page

Statement 1

Discussion 5

- A. The issue decided by the court of appeals is not ripe for this Court's review 6
- B. The court of appeals' decision does not adversely affect the government's enforcement of the Sherman Act 8
- C. The court of appeals' holding is consistent with the statutory text, history, and purposes 10

Conclusion 17

TABLE OF AUTHORITIES

Cases:

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) 13

Caribbean Broadcasting System, Ltd. v. *Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998) 6

EEOC v. *Arabian American Oil Co.*, 499 U.S. 244 (1991) 11

Ferromin Int'l Trade Corp. v. *UCAR Int'l, Inc.*, 153 F. Supp. 2d 700 (E.D. Pa. 2001) 7, 8

Galavan Supplements, Ltd. v. *Archer Daniels Midland Co.*, No. C97-3259 FMS, 1997 WL 732498 (N.D. Cal. Nov. 9, 1997) 7

Hartford Fire Ins. Co. v. *California*, 509 U.S. 764 (1993) 6, 11

Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) 3, 11

National Credit Union Admin. v. *First Nat'l Bank & Trust Co.*, 522 U.S. 479 (1998) 13

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Statutes and regulations:

Antitrust Amendments Act of 1990, Pub. L. No. 101-588, § 4(a), 104 Stat. 2880 15
Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1708 15
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  § 6a, 15 U.S.C. 6a 3, 11
  § 6a(1), 15 U.S.C. 6a(1) 2-3, 6, 8, 12, 13, 14
  § 6a(2), 15 U.S.C. 6a(2) 4, 5, 6, 7, 8, 12, 13, 14
Sherman Act, 15 U.S.C. 1 ..... 2, 4, 10, 11
18 U.S.C. 3553(b) 9
18 U.S.C. 3571 16
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  § 2R1.1(d)(1) 8, 10
  § 5K2.0 9
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Miscellaneous—Continued: Page

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In the Supreme Court of the United States

No. 00-1842

STATOIL ASA, PETITIONER

v.

HEEREMAC V.O.F., ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. In 1997, the United States uncovered a global price-fixing and market-allocation scheme in the heavy-lift marine construction services industry. Oil and gas companies engage heavy-lift marine construction firms to construct, install, move and remove offshore oil and gas production platforms, decks, and similar structures. Such firms use heavy-lift derrick barges, which are floating crane vessels able to lift loads exceeding 4,000 tons. Between 1993 and May 1997, respondents HeereMac, v.o.f., Saipem UK Limited, and McDermott, Inc., and their affiliates, controlled the world's supply of heavy-lift derrick barges. Pet. App. 4a-5a. Those three

companies are based in The Netherlands, the United Kingdom, and the United States, respectively. *Id.* at 5a n.2. In December 1997, the United States charged respondent HeereMac and one of its managing directors with participating in a conspiracy to rig bids for heavy-lift barge services in the United States and elsewhere, in violation of Section 1 of the Sherman Act. 15 U.S.C. 1. The corporation and individual pleaded guilty and agreed to pay fines of $49 million and $100,000, respectively. Pet. App. 6a, 56a, 57a.

In December 1998, petitioner, an oil company owned by the government of Norway, brought suit seeking treble damages for overcharges it allegedly paid to respondents HeereMac and Saipem for heavy-lift barge services in the Norwegian sector of the North Sea. Pet. App. 7a; Pet. 4-5. Petitioner purchased no heavy-lift barge services in the United States, nor did it purchase any such service from McDermott, the only U.S.-based respondent. Rather, its contracts with HeereMac and Saipem were executed and performed abroad and did not specify that United States law applied to disputes arising under those contracts. Pet. App. 5a n.3, 6a n.5.

2. The district court dismissed petitioner's suit on the ground that the alleged conspiracy to fix prices in the North Sea "did not have a direct, substantial, and reasonably foreseeable anticompetitive effect on United States trade or commerce," and thus that the court lacked subject matter jurisdiction under Section 6a(1) of the Foreign Trade Antitrust Improvements Act of

1982 (FTAIA), 15 U.S.C. 6a(1). Pet. App. 51a.[1] The court also observed that petitioner "was allegedly injured outside the United States by [respondents'] bid rigging on jobs located in the Norwegian sector of the North Sea having no direct, substantial effect on United States commerce." *Id.* at 52a. The court accordingly held that petitioner lacked standing to bring its claim, reasoning that the "United States antitrust laws do not extend to protect foreign markets from anticompetitive effects and 'do not regulate the competitive conditions of other nations' economies.'" *Ibid.* (quoting *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 (1986)).

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[1] The FTAIA, which in 1982 became a part of the Sherman Act, provides:

> Sections 1 to 7 of [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
>> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>>
>> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> [*Proviso*] If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1) (B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. 6a.

3. a. A divided panel of the Court of Appeals for the Fifth Circuit affirmed. Pet. App. 1a-22a. The court observed that the FTAIA extends the Sherman Act to non-import foreign conduct only when that conduct has "a direct, substantial, and reasonably foreseeable effect" on United States domestic commerce, 15 U.S.C. 6a(1), and "such effect gives rise to a claim," under the Sherman Act, 15 U.S.C. 6a(2). The court concluded that the alleged conspiracy had a sufficient effect on United States commerce within the meaning of Section 6a(1), because petitioner had alleged that "the conspiracy not only forced purchasers of heavy-lift services in the Gulf of Mexico to pay inflated prices, but also that the agreement compelled Americans to pay supra-competitive prices for oil." Pet. App. 13a-14a. The court held, however, that the district court nonetheless lacked subject matter jurisdiction under Section 6a(2) because petitioner's claimed injury—inflated prices that it paid for heavy-lift services in the North Sea—did not arise from the anticompetitive effects on United States commerce. *Id.* at 16a n.26.[2]

The court concluded that the FTAIA requires that "the effect on United States commerce * * * must give rise to the claim that [petitioner] asserts against [respondents]." Pet. App. 14a. A contrary reading of the Act, the court explained, would invite plaintiffs worldwide to "flock to United States federal court for redress, even if those plaintiffs had no commercial relationship with any United States market and their injuries were unrelated to the injuries suffered in the United States." *Id.* at 15a-16a.

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[2] The court also expressed (Pet. App. 12a) its "doubt that foreign commercial transactions between foreign entities in foreign waters is conduct cognizable by federal courts under the Sherman Act," which applies to "trade or commerce with foreign nations." 15 U.S.C. 1. The court stated that "[t]he commerce that gives rise to the action here—the contracting for heavy lift barge services in the North Sea—was not United States commerce *with* foreign nations, but commerce *between* or *among* foreign nations." Pet. App. 12a.

b. Judge Higginbotham dissented. Pet. App. 22a-38a. In his view, Section 6a(2)'s reference to "*a* claim," rather than the "*plaintiff's* claim," means that the FTAIA confers jurisdiction whenever a conspiracy's conduct has direct, substantial, and reasonably foreseeable effects on U.S. commerce, and those domestic effects give rise to *a* claim by *some* party, even if not the plaintiff. *Id.* at 24a-26a. Judge Higginbotham reasoned that, once jurisdiction is established over the conspiracy's conduct as a whole, a plaintiff may bring suit in federal court to redress foreign injury allegedly suffered as a result of the conspiracy's effects on foreign commerce. *Id.* at 23a, 30a.

DISCUSSION

The decision in this case is the first appellate decision to address whether a plaintiff's antitrust claim involving foreign conduct must derive from that conduct's effect on domestic commerce. Appeals that raise the same issue are pending in five other courts of appeals. Thus, even if the issue otherwise warranted this Court's review, it would not be ripe for review at this time. Nor is there any basis for concluding that the Fifth Circuit's decision will impair the United States' efforts to enforce the Sherman Act against international cartels. The court of appeals was, moreover, correct in holding that the FTAIA requires that the anticompetitive effects on United States commerce must give rise to a plaintiff's claimed injuries.

A. THE ISSUE DECIDED BY THE COURT OF APPEALS IS NOT RIPE FOR THIS COURT'S REVIEW

1. Petitioner argues (Pet. 24-26) that the Court's review is warranted to resolve a conflict between the Fifth Circuit's decision and the District of Columbia Circuit's decision in *Caribbean Broadcasting System, Ltd.* v. *Cable & Wireless PLC*, 148 F.3d 1080 (1998). See also Pet. App. 55a (statement of Higginbotham, J., on denial of rehearing en banc). We disagree. In *Caribbean Broadcasting*, the plaintiff, which owned a radio station in the Eastern Caribbean (which includes Puerto Rico and the U.S. Virgin Islands), sued the owner of several competing radio stations and its joint venture partner for violations of the Sherman Act. The court of appeals held that the plaintiff had averred a "direct, substantial, and reasonably foreseeable effect" on United States commerce within the meaning of Section 6a(1), because the plaintiff allegedly had been foreclosed from selling advertisements to customers in the United States. *Id.* at 1086. That holding was limited to whether the plaintiff had alleged a sufficient impact on domestic commerce, and the court of appeals did not address whether the alleged domestic effect "gave rise" to plaintiff's claim. Indeed, the decision does not refer to Section 6a(2). See also Pet. App. 20a-21a & n.31 (distinguishing *Caribbean Broadcasting* and explaining that the claim in that case arose from an alleged effect on domestic commerce).[3]

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[3] Petitioner also errs in contending (Pet. 22-24) that the Fifth Circuit's decision conflicts with *Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764 (1993). That decision neither interpreted Section 6a(2) of the FTAIA, cf. *id.* at 796 n.23, nor considered

2. Although the decision below is the first appellate decision to interpret Section 6a(2), with increasing frequency foreign plaintiffs have sued to recover damages arising out of foreign purchases of conspiratorially price-fixed items, when the conspiracy's conduct also affects United States commerce. To date, no district court that has considered the application of Section 6a(2) to such facts has embraced petitioner's reading of the Act. See, *e.g.*, *Ferromin Int'l Trade Corp.* v. *UCAR Int'l, Inc.*, 153 F. Supp. 2d 700, 704 (E.D. Pa. 2001) (citing cases); see also *Galavan Supplements, Ltd.* v. *Archer Daniels Midland Co.*, No. C97-3259 FMS, 1997 WL 732498, at *2, *3-*4 (N.D. Cal. Nov. 19, 1997) (dismissing for lack of standing). Five decisions considering the issue are pending on appeal in the District of Columbia, Second, Third, Seventh, and Ninth Circuits. *Empagran, S.A.* v. *F. Hoffman-La Roche, Ltd.*, No. 01-7115 (D.C. Cir. filed July 25, 2001); *Kruman* v. *Christie's Int'l PLC*, No. 01-7309 (2d Cir. argued Oct. 3, 2001); *BHP New Zealand, Ltd.* v. *UCAR Int'l, Inc.*, Nos. 01-3329, 01-3340, & 01-3991 (3d Cir. filed Aug. 29, 2001) (appeals from the *Ferromin* decision); *Metallgesellschaft AG* v. *Sumitomo Corp. of Am.*, No. 00-3700 (7th Cir. argued Sept. 5, 2001); *Litton Systems, Inc.* v. *Honeywell, Inc.*, No. 99-56892 (9th Cir. argued Mar. 5, 2001). Resolution of those appeals will likely provide further illumination concerning the question presented and may or may not generate a conflict in the circuits warranting this Court's review. Review by this Court at the present time accordingly would be premature.[4]

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whether the Sherman Act extends to foreign injury that lacks a connection to United States commerce.

[4] Petitioner mistakenly suggests (Reply Br. 4) that this case uniquely alleges a global conspiracy that includes geographic

B. THE COURT OF APPEALS' DECISION DOES NOT ADVERSELY AFFECT THE GOVERNMENT'S ENFORCEMENT OF THE SHERMAN ACT

Petitioner argues (Pet. 18-21) that, because the Sherman Act has the same jurisdictional reach in both civil and criminal cases, see *United States* v. *Nippon Paper Indus. Co.*, 109 F.3d 1, 4-6 (1st Cir. 1997), cert. denied, 522 U.S. 1044 (1998), this Court's review is necessary to prevent the Fifth Circuit's decision from impairing the government's ability to enforce the Sherman Act. That contention lacks merit.

1. The Fifth Circuit's holding that a plaintiff's claim must derive from the conspiracy's effect on domestic commerce does not preclude the government from prosecuting violations of the Act by global cartels. District courts have jurisdiction over illegal foreign activity that has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce. 15 U.S.C. 6a(1). When an international cartel's conduct as a whole has that effect, "such effect gives rise" to the United States' "claim" under the Act. 15 U.S.C. 6a(2); see also Pet. App. 21a (noting that global conspiracy that has the effect of raising prices in the United States gives rise to a government claim).

2. Petitioner also errs in suggesting (Pet. 18-20) that the Fifth Circuit's decision may inappropriately reduce the size of fines the United States can recover under the Sentencing Guidelines, which instruct courts to use "20 percent of the volume of affected commerce" in establishing a Base Fine. Sentencing Guidelines § 2R1.1(d)(1). It is the policy of the United States to

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market allocation. Other cases contain similar allegations. See, *e.g.*, *Ferromin*, 153 F. Supp. 2d at 701-702; *Empagran*, 2001 WL 761360, at *2.

calculate the Base Fine by using only the domestic commerce affected by the illegal scheme, and in all but two of the dozens of international cartel cases prosecuted (see p. 10 & note 5, *infra*), fines obtained by the government were based solely on domestic commerce. Gary R. Spratling, *Negotiating The Waters Of International Cartel Prosecutions: Antitrust Division Policies Relating To Plea Agreements In International Cases* 14-15 (Mar. 4, 1999) (speech by Deputy Assistant Attorney General for Criminal Enforcement), *available at* <http://www.usdoj.gov/atr/public/speeches/2275. htm>. The Base Fine is then adjusted by minimum and maximum multipliers that are derived from a culpability score. Guidelines §§ 8C2.5 and 8C2.6. Using that framework, the United States has obtained very large fines against international cartels. In the last five years, fines of $10 million or more have been imposed against 35 domestic and foreign-based corporations, including six fines of $100 million or more, and one fine of $500 million, which represents the largest criminal fine ever obtained by the Department of Justice under any statute.

Moreover, and consistent with the Fifth Circuit's decision, a court may consider the foreign commerce affected by the illegal conduct when the amount of affected domestic commerce understates the seriousness of the defendant's role in the offense and, therefore, the impact of the defendant's conduct on United States consumers. In that circumstance, the court may take into account the defendant's worldwide sales affected by the conspiracy in making an upward departure in a defendant's sentence under Guideline § 5K2.0. See 18 U.S.C. 3553(b) (permitting sentence in excess of Guidelines range when court finds "that there exists an aggravating * * * circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines").

The United States has used that approach in negotiating two plea agreements, one of which involved the conduct that is the subject of petitioner's suit. The government and respondent HeereMac, v.o.f. agreed to increase the fine by $20 million after taking into account the company's foreign sales of heavy-lift barge services of more than $1 billion as a more accurate indication of the defendant's culpability. The United States did not, however, simply plug the company's foreign sales into the Base Fine calculation of § 2R1.1(d)(1)—which would have yielded a fine exceeding $240 million—nor has it ever treated foreign sales in that way. Rather, the level of foreign sales was used as an indication of the company's culpability and that approach yielded a total fine of $49 million. See Pet. App. 56a, 60a-63a. That type of vigorous enforcement of the Sherman Act against international cartels will continue unimpaired by the Fifth Circuit's decision.[5]

C. THE COURT OF APPEALS' HOLDING IS CONSISTENT WITH THE STATUTORY TEXT, HISTORY, AND PURPOSES

Section 1 of the Sherman Act declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce * * * with foreign nations." 15 U.S.C. 1. Although Congress generally intends that its laws apply only within the territorial jurisdiction of the United States, *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 248 (1991), "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 (1993); *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582-583 n.6 (1986); see also *United States* v. *Nippon Paper Indus. Co.*, 109 F.3d 1, 4-6 (1st Cir. 1997) (holding that Sherman Act's criminal provisions apply to wholly foreign conduct with intended and substantial domestic effects).

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[5] The other instance in which a negotiated fine partially reflected foreign sales was *United States* v. *Roquette Freres*, Crim. No. CR 97-00356 (N.D. Cal. 1997), in which the defendant's United States market share was relatively small compared to its share of the worldwide market. Based on defendant's volume of United States commerce of $2.6 million, the corresponding Guidelines fine range was $748,000 to $1,282,000. The court imposed the agreed-upon fine of $2.5 million.

In amending the Sherman Act in 1982, Congress in the FTAIA provided that the Sherman Act applies to import commerce, in a more limited way to United States export commerce, and to foreign conduct when "(1) such [foreign] conduct has a direct, substantial, and reasonably foreseeable effect * * * on [United States domestic commerce] * * * and (2) such effect gives rise to a claim" under the Sherman Act. 15 U.S.C. 6a. It is not disputed in this case that Section 6a confers subject matter jurisdiction over a plaintiff's claim that arises from an illegal conspiracy's anticompetitive effects on domestic commerce, whether the plaintiff is located here or abroad. Pet. App. 14a n.22 & 16a n.25; cf. *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308 (1978) (holding that a foreign country may sue under the Sherman Act). The question presented in this case is whether the Sherman Act applies "where the situs of the injury is overseas and that injury arises from effects in a non-domestic market." Pet. App. 16a. The Fifth Circuit properly answered that question in the negative.

1. a. Section 6a(1) of the FTAIA provides that the Sherman Act extends to foreign non-import conduct only when it has a sufficient effect on United States commerce. 15 U.S.C. 6a(1). Section 6a(2) further requires that "such effect gives rise to a claim" under the Sherman Act. 15 U.S.C. 6a(2).

Petitioner argues (Pet. 10-13) that, because Section 6a(2) states that the requisite effects on United States commerce must give rise to "a" claim, a plaintiff need only point to the existence of some other party's viable claim arising from the same conduct that injured the plaintiff, even though the plaintiff's claimed injury has no connection to United States commerce. Read in context, however, the most natural reading of Section 6a(2)'s requirement that "such effect gives rise to a claim," is that the requisite anticompetitive effects on domestic commerce must give rise to the claim brought by the *particular plaintiff* before the court. See *Textron Lycoming Reciprocating Engine Div. AVCO Corp.* v. *UAW*, 523 U.S. 653, 657 (1998) (noting "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used") (internal quotation marks omitted); cf. *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975) ("[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, * * * the plaintiff * * * cannot rest his claim to relief on the legal rights or interests of third parties.").

b. The Fifth Circuit's decision also comports with principles of antitrust injury and standing that ensure that the antitrust laws redress only the type of injury that the laws were designed to prevent. By requiring that the effect on domestic commerce must "give[] rise to a claim," 15 U.S.C. 6a(2), Congress incorporated general concepts of antitrust injury and standing into the FTAIA. See H.R. Rep. No. 686, 97th Cong., 2d Sess. 11 (1982) ("[T]he Committee does not intend to alter existing concepts of antitrust injury or antitrust standing"). To establish standing to seek relief under the Sherman Act, a plaintiff must show "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). A contrary result would "divorce antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so." *Id.* at 487; cf. *National Credit Union Admin.* v. *First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998) (describing prudential standing requirement that a plaintiff's interest must arguably fall within the zone of interests to be protected by statute).

The FTAIA's text contains no hint of a statutory purpose to permit recovery where the situs of injury is entirely foreign and the injury exclusively arises from a conspiracy's effect on foreign commerce. To the contrary, the FTAIA is concerned with foreign conduct that affects commerce *in the United States.* 15 U.S.C. 6a(1). Indeed, the paramount purpose of the United States' antitrust laws is to protect consumers, competition, and commerce in the United States. See *Pfizer*, 434 U.S. at 314 ("Congress' foremost concern in passing the antitrust laws was the protection of Americans."). That purpose is served by applying the Sherman Act to foreign conduct when it has a "direct, substantial, and reasonably foreseeable effect" on United States commerce and "such effect gives rise" to the plaintiff's claim. 15 U.S.C. 6a(1) and (2). That purpose is not served when the plaintiff's injuries have no nexus to United States commerce.[6]

Indeed, petitioner's interpretation of Section 6a would expand the jurisdiction of the Act in ways that Congress could not have intended. Consider, for example, an international price-fixing cartel with wholly foreign members that had annual foreign sales of $2 billion to 50 foreign customers, and annual sales in the United States of $1 million to one U.S. customer. Under petitioner's construction, because the domestic customer could sue based on the conspiracy's requisite domestic effects, all 50 foreign customers could bring treble-damages actions in federal court, "even if those plaintiffs had no commercial relationship with any United States market and their injuries were unrelated to the injuries suffered in the United States." Pet. App. 15a-16a.

2. Petitioner contends (Pet. 12-13) that the legislative history of Section 6a manifests a purpose to extend the jurisdictional reach of the Sherman Act to foreign injury with no connection to United States commerce. The House Report indicates, however, that Congress inserted Section 6a(2) merely to ensure that the covered foreign conduct must have an *anticompetitive* impact on domestic commerce to be actionable under

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[6] As the court of appeals recognized (Pet. App. 14a n.22 & 16a n.25), the antitrust laws protect all participants in United States commerce, regardless of nationality. Moreover, the Department of Justice and the Federal Trade Commission, the federal agencies charged with the responsibility of enforcing the antitrust laws, "do not discriminate in the enforcement of the antitrust laws on the basis of the nationality of the parties." U.S. Dep't of Justice & Federal Trade Comm'n, *Antitrust Enforcement Guidelines For International Operations* § 2 (Apr. 1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,107, at 20,589-20,592.

the Sherman Act. H.R. Rep. No. 686, 97th Cong., 2d Sess. 11-12 (1982). Absent that subsection, the House Report explains, a plaintiff injured abroad might have been able to bring suit in federal court "merely by proving a *beneficial* effect within the United States, such as increased profitability of some other company or increased domestic employment." *Id.* at 11; see also *id.* at 18. Although the House Report further indicates a legislative intent to extend antitrust protection to foreign purchasers in the "*domestic* marketplace," *id.* at 10, nothing in the FTAIA's history addresses foreign purchasers, such as petitioner, whose injuries are not linked to a conspiracy's effects on domestic commerce.

3. Petitioner also argues (Pet. 16-20) that its construction is necessary to ensure adequate deterrence of international cartels. The Fifth Circuit's holding, however, reads Section 6a broadly to extend to all plaintiffs (whether domestic or foreign) whose injuries arise from a conspiracy's anticompetitive effect on United States commerce. That holding does not undermine the Sherman Act's protection of United States consumers and commerce.

Indeed, the legal landscape in recent years has changed significantly in response to the need to deter illegal cartels operating both here and abroad. In 1974, Congress raised the statutory maximum corporate fine for a violation of the Sherman Act from $50,000 to $1 million. Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1708. In 1990, Congress increased that amount ten-fold, to $10 million. Antitrust Amendments Act of 1990, Pub. L. No. 101-588, § 4(a), 104 Stat. 2880. Moreover, since 1987, defendants may be fined up to twice the gross gain from the offense or twice the gross loss to victims of the offense if those amounts exceed the maximum fine authorized under the Sherman Act. 18 U.S.C. 3571.

There also has been a marked growth in foreign antitrust statutes in the last decade. Today, approximately 90 countries have laws protecting competition. A. Douglas Melamed, *An Address to the 27th Annual Conference on International Antitrust Law and Policy, on the Subject of Promoting Sound Antitrust Enforcement In The Global Economy* 5 (Oct. 19, 2000), *available at* <http://www.usdoj.gov/atr/public/speeches /6785.htm>. Although it remains to be seen how vigorously foreign nations will implement or enforce their new antitrust laws—and therefore how substantial their deterrent effect will be—their existence counsels caution in extending the reach of United States antitrust laws, and makes it all the more appropriate for this Court to allow further development of the present issue in the lower courts. Of particular relevance here, Norwegian law provides for criminal prosecution and private actions in response to anticompetitive conduct, and petitioner has filed a civil action against respondents under Norwegian law. Pet. 10 n.8.[7]

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[7] The global response to the international "bulk vitamins cartel" well illustrates energetic enforcement efforts against cartels operating worldwide. The United States negotiated plea agreements with eleven corporate defendants and obtained fines of approximately $900 million. Those defendants also have paid hundreds of millions of dollars to domestic purchasers of vitamins, and further litigation continues. *In re Vitamins Antitrust Litig.*, No. 99-197 TFH, 2000 WL 1737867 (D.D.C. Mar. 31, 2000). In addition, European Union, Canadian, and Australian authorities obtained record fines against vitamin suppliers. European Commission, *Commission imposes fines on vitamin cartels, available at* <http:// europa.eu.int/comm/competition/index_en.html> (over $750 million in fines); Australian Competition & Consumer Comm'n, *Federal Court Imposes Record $26M Penalties Against Vitamin Suppliers*

* * * * *

In sum, the court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals. The decision will not impair the United States' ongoing efforts to enforce the Sherman Act against international cartels, and it is correct in its interpretation of the FTAIA. Moreover, because appeals raising basically the same legal question are currently pending in five other courts of appeals—whose decisions could provide further illumination—review by this Court would be premature at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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